

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 108
5534644

BETWEEN STEVEN JAMES GIBBS
Applicant
AND 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: 22 April and 8 May 2015 at Christchurch
Submissions Received: 25 May 2015 from the Applicant
25 and 29 May 2015 from the Respondent
Date of Determination: 3 August 2015

DETERMINATION OF THE AUTHORITY

- A Steven James Gibbs was unjustifiably dismissed.**
- B The interim order for reinstatement is made permanent.**
- C The Vice-Chancellor of Lincoln University is to reimburse any wages lost before the order for interim reinstatement and if agreement cannot be reached on a figure Mr Twomey and Ms Gibson can return to the Authority.**
- D The Vice-Chancellor of Lincoln University is to pay to Steven James Gibbs compensation in the sum of \$10,000 without deduction under s 123 (1) (c) (i) of the Employment Relations Act 2000.**

E Costs are reserved and failing agreement a timetable has been set.**Employment relationship problem**

[1] Dr Steven James Gibbs (Jim) was employed by the Vice-Chancellor of Lincoln University (the University) from 2004-2006 as a post-doctoral fellow and from 2006 as senior lecturer in the Faculty of Agriculture and Life Sciences (AGLS).

[2] Dr Gibbs was, after his appointment as a senior lecturer, on an individual employment agreement (the agreement) based on the terms and conditions of employment in the current Academic Staff Collective Agreement.

[3] On 26 March 2014 the University issued a memorandum for change proposal for AGLS which included proposal 9. Proposal 9 could affect Dr Gibbs' position.

[4] On 28 May 2014 after consultation a further memorandum was issued confirming the decision to proceed with proposal 9.

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

[6] Dr Gibbs says that the termination of his employment was unjustified on five grounds:

- (a) His selection by the respondent for redundancy was based on an incorrect understanding of his teaching hours, did not take into account other available teaching hours and specialist teaching capacity (rationale for selection);
- (b) The selection categories were unfairly and unreasonably constructed (points allocation and weighting of the points were not commensurate to the value traditionally and usually ascribed to the criteria);
- (c) The allocation of the scores were demonstrably wrong;

- (d) The expertise of the selection panel and the process used by the respondent to arrive at the total points was not applied in an even-handed manner. This ground includes an analysis of the respondent's provision of information to Dr Gibbs during the process;
- (e) The timeframe for the process and time limits prescribed by the respondent.

[7] The University does not accept that the termination of Dr Gibbs' employment was unjustified. It says that the termination was justified on the basis of a genuine redundancy selection affecting his position. Further, that it carried out a robust and transparent consultation and selection process in reaching the decision that Dr Gibbs' position was surplus. The University says that throughout the entire process, and in reaching the decision that Dr Gibbs' position was surplus, its actions and the way in which it acted were what a fair and reasonable employer could have done in the circumstances with which it was dealing.

[8] Dr Gibbs was reinstated on an interim basis to his position by order of the Authority dated 28 January 2015 from 16 February 2015. The parties attended mediation following Dr Gibbs interim reinstatement to his position. The matter was unable to be resolved.

[9] The main remedy Dr Gibbs seeks is permanent reinstatement to his previous position although he also wishes to be awarded compensation and reimbursement of lost wages prior to his interim reinstatement.

The legal principles for a redundancy dismissal

[10] The issue for the Authority is whether Dr Gibbs' dismissal was justified. The test of justification under s 103A of the Employment Relations Act 2000 (the Act) is to be applied by the Authority on an objective basis by considering whether the employer's actions and how the employer acted were what a fair and reasonable employer could have done in all the circumstances.

[11] The Court of Appeal did not dismiss in its judgment in *Grace Team Accounting Ltd v. Brake*¹ the importance of addressing the genuineness of a redundancy decision and stated that if an employer can show the redundancy is

¹ [2014] NZCA 541 at [84]

genuine and that the notice and consultation requirements of s 4 of the Act have been duly complied with, then that could be expected to go a long way towards satisfying the s 103A test².

[12] A fair and reasonable employer will comply with statutory and contractual obligations. Section 4 of the Act requires parties to an employment relationship to deal with each other in good faith and not mislead or deceive each other or do anything that is likely to mislead or deceive the other.

[13] The duty of good faith requires an employer proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of employees to provide to the affected employees access to information which is relevant to the continuation of employment and an opportunity to comment on that before the decision is made – s 4 (1A) (c). The duty of good faith also applies to consultation between an employer and its employees' and includes the effect on employees of changes to the employer's business and making employees redundant.

The Issues

[14] The issues for determination as to whether Dr Gibbs' dismissal was justified are as follows:

- (a) Was there a genuine redundancy situation?
- (b) Was the rationale for Dr Gibbs' inclusion into the selection pool fair and reasonable?
- (c) Were the selection categories and criteria fair and reasonable?
- (d) Was the composition of the selection panel fair and reasonable?
- (e) Was the selection process fair?
- (f) Was the allocation of points fair and reasonable?
- (g) Was the timeframe for the process and the time limits fair and reasonable?
- (h) Was Dr Gibbs' dismissal for reason of genuine redundancy?

² At [85]

- (i) If the dismissal was unjustified then what remedies should be awarded and would it be practicable and reasonable to reinstate Dr Gibb to his previous position or one no less favourable?

The background to the proposal to reduce one FTE teaching in undergraduate animal production

[15] Clause 40 of Dr Gibbs' employment agreement provides that a redundancy may occur in a situation where the employee's position is terminated because it has become superfluous to the University's needs. Clause 42 provides for consultation in the event of change. Clause 42 is consistent with statutory good faith obligations including the provision of sufficient information to enable proper comment.

[16] The primary objectives of Dr Gibbs' role were set out in the job description for the position enclosed with the letter of offer dated 24 April 2006.

[17] Clause 3 of the job description as follows:

Primary Objectives

- 3.1 *To contribute to teaching in undergraduate and postgraduate animal science/animal production subjects in their areas of industry specialisation and academic training and to assist in supervision of honours and postgraduate student research.*
- 3.2 *To initiate, develop and conduct high quality research and to publish the results in recognised journals in academic/professional conferences and through industry publications and meetings.*
- 3.3 *Performance based research fund (PBRF): Contribute actively to advancing the University's research culture and research outputs by developing personal and team-based research programmes in animal science/animal production.*

[18] The University undertook a qualifications reform process in 2013 involving all three faculties (qualifications reform) and advised staff that the purpose of that process was not to reduce staffing but to secure the best, revised curriculum to align with the University's specialist land-based focus. The outcome included a reduction in programmes from over 40 to 24 and a significant reduction in courses.

[19] There were significant financial pressures at the University as a result of multiple years of deficits exacerbated by the Christchurch earthquakes. The

University in response to financial pressures and Government signals determined that it needed to reduce its personnel costs by \$4 million by 1 January 2015. This led to the change proposal in 2014.

[20] Deputy Vice-Chancellor Stefanie Rixecker (DVC Stefanie Rixecker), led the change process for the three faculties and the research and commercialisation office. She asked the three faculty Deans to provide indicative figures of the reduction in personnel costs they were to aim to achieve and they were tasked with developing a change proposal which would achieve those personnel savings.

[21] Dean Bruce McKenzie is Dean of AGLS. He developed in conjunction with DVC Stefanie Rixecker the memorandum of change proposal for AGLS dated 26 March 2014 (the change proposal).

[22] The change proposal set out the current situation for AGLS. The reform process had resulted in the deletion of 36 undergraduate courses and the creation of 19 new courses, a net reduction of 17 courses in the faculty. The change proposal set out that this had made it necessary to examine present and required teaching deliveries to ensure delivery of courses in a cost effective manner. Further that there was a preliminary view that the reduction in courses as a result of the review are such that AGLS is overstaffed and there are areas where changes should be made.

[23] The reasons for change were set out in the change proposal. The first driver was to restore financial viability. The second driver was the qualification reform which had resulted in AGLS reducing the number of undergraduate courses and a preliminary view that there were fewer staff required for current teaching deliveries. The third driver for the proposed change was to better align staffing with the strategic direction of the University enhancing opportunities for increased revenue generation via externally funded research.

[24] There were various changes proposed for departments and other positions within the AGLS faculty but the focus for the Authority is on proposed changes in the Department of Agricultural Sciences where animal science and plant science staff work. Plant science academic staff were not included in the change proposal and there was no reduction to the courses in plant science as a result of the reform proposal. Nine academic staff including Dr Gibbs taught animal science in the Department of Agricultural Sciences.

[25] The proposed changes that potentially affected Dr Gibbs are set out in proposal 9 of the change proposal which provides

The number of academic positions in Undergraduate Production Animal Science (teaching into some or most of ANSC 213, ANSC 312 and ANSC 314) be reduced from three (3.0FTE) to two (2.0 FTE). The Qualifications Reform resulted in a significant reduction in the number of animal science courses taught in the Faculty, with the deletion of 13 courses and the addition of 4 new courses. We are of the preliminary view that this means the existing level of staffing in undergraduate production animal science exceeds requirement. Having taken the reduction of teaching into consideration, it is proposed that the number of academic staff engaged in teaching undergraduate production science is reduced from three (3.0FTE) to two (2.0FTE) academic positions. Consequently, this proposal has a potential impact on the following three positions in undergraduate production animal science; Lecturer in Animal Science (1.0FTE) and Senior Lecturer in Animal Science (2.0FTE). Should this proposal go ahead following consultation, a selection process [set out in the change proposal] will be used to determine who will occupy the ongoing two academic positions.

[26] Dean McKenzie in his evidence said that he had omitted to include in the reduction of animal science courses ANSC 121 and there should have been reference to a net reduction in 10 undergraduate courses.

[27] The three academic staff that Dean McKenzie identified should be in the selection pool were Dr Gibbs and one other senior lecturer and one lecturer. In my determination of the interim reinstatement application I referred to the other senior lecturer as Dr A and the lecturer as Dr B and I shall continue to refer to them in that manner in this determination.

[28] Dr Gibbs provided a general submission to the proposal to reduce animal science teaching staff with five main objections to the reduction of teaching staff in animal science during the seven week consultation period.

[29] At the end of the consultation period, there were some changes to some of the proposals but not to proposal 9. Proposal 9 was confirmed and Dr Gibbs advised on 28 May 2014.

[30] On 27 May 2014 Dr Gibbs wrote a letter to the Head of Department of animal science, Grant Edwards. He stated in his letter that he had been informed of a conversation Professor Edwards had with another staff member about his employment. Amongst other matters he said that there was discussion about the competition between Dr Gibbs and Dr A for a position in some detail. Dr Gibbs

expressed concern about the conversation taking place before the closing date for the submissions from staff for consultation.

[31] On 12 June 2014 Professor Edwards responded to Dr Gibbs by letter. He confirmed that there are 3 positions in the selection pool and that he had had several conversations regarding the change proposal and selection processes with staff and did not see any issues in discussing the processes prior to the submissions closing with in particular, vulnerable staff.

Was there a genuine redundancy situation?

[32] The University had a significant reduction in its undergraduate courses as a result of the qualifications reform. I accept Ms Gibson's submission that the total reduction in teaching hours in animal science where Dr Gibbs worked was 360 hours.

[33] I am satisfied in this case that there was a reduction in teaching hours that justified a restructuring/review process for a reduced number of positions in animal science. The University decided that it would reduce by one position.

[34] The Authority is to consider the fairness of the process including whether Dr Gibbs should have been included in the selection pool and whether he should have been selected.

[35] In *Jinkinson v Oceana Gold (NZ) Ltd*³, the Employment Court was looking at a dismissal of Ms Jinkinson for redundancy. At paragraph [41] of the judgment, Judge Couch stated amongst other matters that:

...the decision to disestablish Ms Jinkinson's existing position as a grade controller and the decision not to appoint her to one of the mine technician positions were both essential aspects of the employer's actions leading to her dismissal. Had either decision been made differently, she would not have been dismissed. In carrying out the selection process Oceana Gold was undoubtedly proposing to make a decision that would, or was likely to, have an adverse effect on the continued employment of one or more of its employees. Those who were selected would have their employment continued. The employment of those not selected would be terminated.

[36] Judge Couch referred to section 4(1A)(c) of the Act applying to the selection process and in paragraph [42] said:

³ 2010] NZEmpC 102

The relationship between section 4(1A)(c) and section 103A is clear. A fair and reasonable employer will comply with its statutory obligations. It follows that a dismissal which results from a procedure which does not comply with section 4(1A)(c) will not be justifiable.

Was the rationale for Dr Gibbs' inclusion into the selection pool fair and reasonable?

[37] Change proposal 9 affected three positions in undergraduate production animal science teaching into some or most of ANSC 213, ANSC 312 and ANSC 314. The three papers were the major production papers at undergraduate level which the University was required to continue to deliver although the teaching loads are shared by other academic staff within animal science.

[38] I questioned Dean McKenzie whether thought had been given to inclusion in the selection pool of all the academic staff in animal science instead of restricting the selection pool to three academic staff. He said that there had been some thought given to selecting all animal science staff but it was not possible to replace the areas of expertise that some staff had in order to enable teaching requirements to be met. Dean McKenzie accepted that limiting selection for inclusion in the pool for that reason may not have been altogether clear from the change proposal. He also thought that it would have been difficult for morale of the department if all academic staff in animal science had been selected.

[39] Dean McKenzie put weight on the fact that the three staff selected for inclusion in the selection pool taught in overlapping and similar though not identical areas which meant it was easier to reallocate the remaining teaching duties with a reduction of one FTE. He said that whilst there had been a significant decrease in the teaching requirements in animal science this was particularly so in undergraduate production animal science.

[40] In her evidence DVC Stefanie Rixecker was concerned with good faith obligations in including all of the animal science academic staff in the selection pool when there was no intention of disestablishing the positions of academic staff that had specialist expertise required to meet the University's ongoing teaching requirements.

[41] A fair and reasonable employer could make the decision to exclude certain positions from a selection process for redundancy and ultimately redundancy itself.

The reason for doing that though must be clear and transparent as must the criteria applied to protect the position or positions. Consultation must enable proper opportunity to comment.

[42] The decision to include Dr Gibbs in the selection pool was an important one and one which the Authority can objectively assess and review along with other actions of the University that led to his dismissal.

Raising of concerns about inclusion into the pool for selection

[43] There was a meeting with Dr Gibbs, Dean McKenzie and the then Director of Human Resources at the University Julie Williamson on 3 June 2014. Dr Gibbs sought clarification and raised concerns with Dean McKenzie after confirmation of proposal 9 about his inclusion into the pool for selection. The concerns were about his teaching load not being accurately calculated, a concern that a teaching load of 60 contact hours had not been included in the total teaching hours in animal production to justify disestablishment of a position and that his specialist area of animal health had not been considered.

Teaching Load

[44] Dr Gibbs recorded the three areas of concern about his inclusion in the selection pool in a letter sent after the 3 June 2014 meeting to Dean McKenzie on 12 June 2014.

[45] Dr Gibbs considered the division of staff as described in proposal 9 into animal science/animal production artificial and simply done to justify the selection. A distinction between the two areas of animal science and animal production is supported by Dr Gibbs' job description. It provides in clause 3.1 as one of the primary objectives *To contribute to teaching in undergraduate and postgraduate animal science/ animal production subjects.....*

[46] Dr Gibbs recorded in his letter that Dean McKenzie unambiguously explained that the selection of animal science staff for disestablishment of their positions was made on the basis of the undergraduate teaching load. He wrote *That is how the three staff in 'Animal Production' teaching were selected, and this on the basis of their teaching around 75 hours, information given to you by the Head of Department.* Dr Gibbs set out that this was entirely incorrect in his case as he teaches

approximately 100 direct contact hours a year in 2014⁴ and he set out the hours and subjects he taught. Dr Gibbs was concerned that his total teaching load had not been taken into account and one subject had been missed out, ANSC 207, into which he taught 3 hours.

[47] Dr Gibbs wrote that despite Dean McKenzie's unambiguous explanation of how staff were selected for disestablishment of their position he had been included without meeting the criteria - *there are five other Animal Science employees who teach fewer contact hours than I, and they teach in fields in which I am clearly as, or more, qualified to teach....*

[48] At that time Dean McKenzie had concluded that Dr Gibbs' total teaching hours were 75 hours reduced from 141 hours in 2013. Dean McKenzie said in evidence that the other academic staff included in the selection pool, Dr A and Dr B had teaching hours in 2013 of 98 and 97 which then reduced to 82 and 80. He said in his evidence that he could not recall at the meeting on 3 June 2014 referring to staff being selected on the basis of their teaching around 75 contact hours. I think it is very unlikely that Dr Gibbs would not have asked a question about the teaching loads (hours) relied on for inclusion in the selection pool. If the hours Dean McKenzie had concluded Dr Gibbs was teaching were about 75 and the hours of Dr A and Dr B about 80 then it is not unlikely that he would have mentioned a teaching load of about 75 hours.

[49] Dean McKenzie responded to Dr Gibbs in a letter dated 16 June 2014. In respect of teaching load he did not disagree with Dr Gibbs' statement that the selection of the three staff for disestablishment was on the basis of undergraduate teaching load. He set out some difficulty in reconciling the teaching hours Dr Gibbs set out. I accept he genuinely had difficulties in that regard but ultimately agreed that Dr Gibbs taught more than the 75 hours but not as much as 107 hours. He said in his letter even if he was to accept 107 hours were taught by Dr Gibbs that would still represent a significant reduction from Dr Gibbs hours of 141 in 2013. Dean McKenzie did not address the issue of Dr Gibbs having more contact teaching hours than five other academic staff.

⁴ Accepted that it could be 95 hours in evidence

[50] Dr Gibbs agreed in his evidence that his teaching load could have been about 95 hours. Dean McKenzie agreed that Dr Gibbs' teaching load could have been between 90 – 95 hours at the material time. Dr Gibbs accepted that his teaching load was impacted by the reform proposal as were the hours of all academic staff in the animal science department. There is about a 27% difference between teaching loads of 75 hours and 95 hours. While Dean McKenzie accepted that Dr Gibbs' teaching load was higher than 75 hours, limited weight was given to that other than to state it was still a significant reduction on 2013 teaching hours.

[51] Ms Gibson submits that the rationale for the inclusion of individuals in the selection pool did not relate to actual teaching hours, but rather those individuals whose teaching hours had been most impacted by the reduction of courses as a result of the implementation of the Qualifications Reform.⁵

[52] Dr Gibbs in his affidavit evidence states that it was explained to him by Dean McKenzie at the 3 June 2014 meeting that the three academic staff in the pool were not required to teach as many hours in animal production after the qualifications review and they taught significantly fewer hours annually than other staff. Dr Gibbs understood I find that teaching hours were at least part of the rationale for his inclusion in the selection pool. It is further clear that some academic staff were not included in the selection pool for reasons other than teaching hours or having had hours impacted by reduction of courses. The evidence supports that Dr Gibbs' teaching hours had been impacted by the qualifications reform but so had other academic staff in animal science.

[53] The fact some academic staff had been excluded from the selection pool for reasons other than teaching hours would have made it difficult for Dean McKenzie to have addressed a concern from Dr Gibbs that he taught more contact hours than five other academic staff. Dr Gibbs identified this very concern about his selection on the basis of animal production undergraduate teaching on page three of his letter of 12 June 2014:

I have been identified for disestablishment of my position on this basis, and yet this criteria for this identification was not applied generally to Animal Science teaching staff, and if it had been, I would not have been included in this.

⁵ Para 4.4.1

ANSC 072/272

[54] The second issue that Dr Gibbs raised both at the meeting on 3 June 2014 and in his letter of 12 June 2014 was that ANSC 072/272 a second level dairy production subject, had come back into Animal Science from the Department of Farm Management. It carried a teaching load of 60 contact hours. Dr Gibbs was already teaching about 10 hours into that subject. Dr Gibbs stated in his letter of 12 June that it is demonstrably an animal science teaching responsibility and an animal production paper which at present Professor Edwards was teaching but that the contact hours had not been included in the total teaching hours used in animal production to justify disestablishment of positions.

[55] Dr Gibbs said in his letter that he had asked Professor Edwards how the paper was to be taught and that he had said he was not sure but would teach it *for now*. Dr Gibbs set out in the letter why he was the best qualified animal science member to teach the paper. He was already teaching into some of the paper and was *the requested Dairy NZ appointment to their marquee dairy science nutrition panel, with a veterinary background in both lactation and reproduction, and with an industry profile and experience on-farm that no other staff member here has*. Dr Gibbs asked why the hours were not directly included in the hours required for teaching in animal production [Dean McKenzie had advised Dr Gibbs that Professor Edwards had provided teaching hours].

[56] Dean McKenzie responded by letter dated 16 June 2014 to Dr Gibbs about that issue and said:

I am of the view that ANSC 072/272 (Dairy) ...can be effectively and credibly taught by the Head for Department of the Agricultural Sciences Department with some help from others in the Faculty. It is our intention that the HOD will have this responsibility for the foreseeable future and I am not aware of any actual impediment to this occurring. As you are aware, we have a very long history at Lincoln of Professors teaching into Diploma courses.

[57] There is force in Mr Twomey's submission that was a change from Professor Edwards's advice that he was unsure who would be teaching the course for the second part of the academic year. There was no elaboration on why the hours had not been included by Dean McKenzie in his letter in an overall assessment of teaching hours in animal production.

[58] Ms Gibson submits that the fact that proposal 9 did not take into account one sub-degree course (ANSC 072/272) does not impact on its validity. I do not disagree with that submission as far as a reduction in undergraduate courses and teaching loads in animal science could justify one less FTE for reasons I have already set out above. The context in which the 60 hours was raised was whether the rationale for inclusion of Dr Gibbs, Dr A and Dr B in the selection pool in undergraduate animal production could be justified rather than the wider issue of the need to reduce one FTE in animal science.

[59] Dr Gibbs was simply told that Professor Edwards with some help from others would be teaching the sub-degree course into the foreseeable future. Further evidence was given that Dr Gibbs would not in any event have been allocated the full 60 hours.

[60] Dean McKenzie and DVC Stefanie Rixecker in their evidence said that the change proposal was all about undergraduate courses not sub-degree courses like ANSC 072/272. They said that the distinction was well known. Although Dr Gibbs when asked about this in his evidence said that he understood undergraduate courses included sub-degree courses Ms Gibson submitted this is inconsistent with his own feedback to the change proposal.

[61] Having considered the evidence on this issue I cannot be satisfied that proper consideration was given to whether the additional 60 hours in those circumstances changed the basis for inclusion in the selection pool, as least as it had been advised to Dr Gibbs. An additional 60 hours teaching could have had an effect on the teaching load in animal production and most importantly the basis for Dr Gibbs' inclusion in the selection pool.

Specialisation

[62] The third and final issue raised by Dr Gibbs in his letter of 12 June arose from Dean McKenzie advising him at the meeting on 3 June 2014 that one consideration for teaching was the need for specialist areas to be covered.

[63] Dean McKenzie had given Dr Gibbs the example of deer production but Dr Gibbs said in his letter of 12 June that did not seem convincing although I do not need to set out why he was of that view. Dr Gibbs said that he taught in the specialist area of undergraduate teaching in animal health which has always been taught by veterinarians. Dr Gibbs set out in his letter that the only other registered veterinarian

was part time and the teaching load is untenable for a part-time position. He wrote that Dean McKenzie had stated he was not in that department so the teaching was not relevant. Dr Gibbs set out that he was employed by the University to teach animal health and historically has taught the majority of the area outside of the animal science department. He wrote that he taught specialist areas and far more hours into this than the example he was given by Dean McKenzie and that there was a need for more such teaching in a different department. Dr Gibbs asked that the decision be reconsidered.

[64] Dean McKenzie responded about that matter in his letter dated 16 June 2014 as follows:

It is correct that at our meeting, I stated that one consideration for the ongoing teaching roles was the need for specialist areas and I gave deer as an example. I would also agree with you that animal health is a specialist area. However, we do have other staff who teach and have taught animal health. I do not accept your statement that you are employed by Lincoln University to teach animal health particularly and nor does your job description support this contention.

[65] Dean McKenzie said in his letter that he had reflected on and reconsidered the final decision but continued to be very clearly of the view that it is possible to deliver the required undergraduate animal science production courses with 2.0 FTE instead of the present 3.0 FTE. He advised that the selection process would continue.

Conclusion on inclusion of Dr Gibbs in the selection pool

[66] Ms Gibson submits that the decision reached about the composition of the selection pool and Dr Gibbs' inclusion in it was one that a fair and reasonable employer could have made.

[67] The evidence supported all academic staff in animal science had teaching hours impacted by the reduction in courses following the qualifications reform. Of the nine academic staff in animal science five were excluded from selection on the basis that they taught in specialist areas required to meet teaching requirements. The sixth staff member's exclusion was on different grounds as his teaching had not been reduced. There was also consideration given to the morale of the department.

[68] I do not find that there was sufficient information made available to Dr Gibbs in change proposal 9 to enable him to properly give his view on inclusion in the selection pool before proposal 9 was finalised. Consultation requires the provision of

sufficiently precise and clear relevant information in a timely way. Dr Gibbs could only have properly been able to comment on the composition of the selection pool and his inclusion in it if he understood the rationale behind it.

[69] Dr Gibbs questioned Dean McKenzie on 3 June 2014 about the basis for his selection. He then raised some significant issues and questions in his letter of 12 June 2014 about the basis on which he had been selected including that he taught more hours than a number of animal science academic staff.

[70] At that stage the proposal had been finalised and I cannot be satisfied from my assessment of the response to those issues that there was an open mind and a readiness by Dean McKenzie or DVC Stefanie Rixecker to reassess or change proposal 9 including the composition of the selection pool and Dr Gibbs' inclusion in it. That is one of the fundamental elements of consultation.

[71] Dr Gibbs was not given sufficient information as good faith obligations require about the issues around teaching load or about whether those who could have been in the selection pool had been assessed on the same criteria as he had. The additional 60 hours teaching in the animal production teaching load was not addressed sufficiently by Dean McKenzie although if it had been taken into account it may have impacted on the basis for Dr Gibbs' inclusion in the selection pool and ultimately his redundancy.

[72] Dean McKenzie did not disclose to Dr Gibbs sufficient information about the criteria for excluding other positions in animal science from selection. I accept Mr Twomey's submission that the decision to exclude them lacked a measure of objectivity.

[73] Dean McKenzie recognised that animal health is a specialist area but said other staff teach animal health and Dr Gibbs was not employed to teach animal health particularly and his current job description did not support this. There is no reference in his job description to animal health teaching but the University has at least for 30 years had a registered veterinarian on staff and pays Dr Gibbs' annual veterinarian registration fees. There is one other veterinarian at the University. The evidence supported that he is retiring in 2017.

[74] Significantly Dr Gibbs was of the view that he could teach most areas in which academic animal science staff taught. This included some areas that Dean McKenzie had said were specialist areas of teaching.

[75] I am not satisfied that Dr Gibbs' inclusion in the selection pool was in accordance with good faith obligations and part of a fair process for the above reasons. It was not what a fair and reasonable employer could have done in all the circumstances and the process was arguably flawed from the outset.

Were the selection categories and criteria fair and reasonable?

[76] After confirmation of proposal 9, the then Senior Human Resources Adviser, Hilary Sinclair-Hyde on 30 May 2014 provided Dr Gibbs, Dr A and Dr B with the selection process details and information pack with the positions for the two ongoing lecturer/senior lecturer roles. She also provided the names and positions of the selection panel members.

[77] The applicants for the selection process 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.

[78] The selection panel then undertook its own preliminary assessment and rated the information before providing the preliminary assessments back to the staff members.

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

Selection criteria

[80] The selection criteria was included as part of the change proposal. The evidence supported that they were not criteria produced specifically for the process. Ms Williamson explained that the selection criteria were developed by human

resources to align with the academic position description template and the criteria within the annual promotion procedures.

[81] The first part of the selection criterion was research which had eight separate criteria to be assessed against. The first four criteria were expressed as required for all academic staff and the second four criteria were expressed as preferred for all academic staff. One of the criteria about production of patentable products advantaged Dr A because he was the only one of the three academic staff who had produced patentable products and therefore scored well on this.

[82] There was a criterion for supervision of postgraduate students and for teaching which had three separate criteria to be assessed against. There was a criterion for wider contribution to the University with two separate criteria to be assessed against and alignment and qualifications criteria.

[83] Dr Gibbs on 3 June 2014 raised a general concern with Ms Williamson and Dean McKenzie about the selection criteria but did not I find elaborate on his concerns as invited to after that time. Two concerns of Dr Gibbs, that Dean McKenzie had changed the selection criteria and that the criteria was produced for the purposes of the selection process for redundancy, were not sustained on the evidence.

[84] Mr Twomey sets out the concerns for Dr Gibbs were that the three core areas of teaching, supervision and research noted in the proposal document were rated disproportionately to other criteria of wider contribution to the University, alignment and qualifications. Some of the submissions overlap with the actual scoring and the selection process which I will consider separately.

[85] Ms Gibson submits that it is the prerogative of the University to determine after consultation the selection criteria provided that the criteria relied upon are not irrelevant or manifestly unfair to any member of the pool. She refers to the Employment Court judgement in *Bourne, Conrad, Turner & NZ Merchant Service Guild v. Real Journeys Limited*⁶.

[86] I accept Ms Gibson's submission that the combined weightings of research and supervision of post graduate students are 45 points, in excess of the other

⁶ [2011] NZEmpC 120

categories. The question in the selection criteria whether an applicant had a PhD was probably unnecessary for the particular process because all three applicants did but each scored 5 out of 5 so there was no real disadvantage in that matter.

[87] As already set out, the question about patentable products did have a significant advantage to Dr A. Objectively assessed it would have been fairer not to have patentable products as a criterion but I could not be satisfied that it was included with the aim of benefiting one candidate over another although it clearly did, or that it was irrelevant. The evidence supported patents are defined in the promotion procedures as an example of a suitable form of publication. There was some unfairness but I do not conclude manifestly so.

[88] There was consultation about the selection criteria and an opportunity for Dr Gibbs to comment on the criteria. There was concern from Dr Gibbs that the weighting and criteria was not that of traditional animal science criteria but his opportunity to comment on that was available during the consultation period and was not taken.

[89] Considered overall I find that the criteria and the weighting allocated to the criteria were what a fair and reasonable employer could have done in all the circumstances.

Was the composition of the selection panel fair and reasonable?

[90] Dr Gibbs had been advised by letter dated 30 May 2015 from Ms Sinclair-Hyde that the selection panel would be a panel of four members including Professor Grant Edwards. A decision however was made by DVC Stefanie Rixecker that given the issues between Professor Edwards and Dr Gibbs he should not be included. The selection panel consisted of three panel members therefore; DVC Stefanie Rixecker, Dean McKenzie and Paul Fleming, Pro-Vice-Chancellor, College of Science, University of Canterbury.

[91] Dr Gibbs was advised of this change by email dated 23 June 2014 from Ms Sinclair-Hyde which confirmed his meeting time on 3 July 2014 with the selection panel. It is clear from her email that Professor Edwards is not on the panel but she does not elaborate in the email on the reasons why there were now only three panel members. By that time Dr Gibbs had prepared and submitted his application which

included a self-appraisal form and supporting information with the understanding that Professor Edwards would be on the panel.

[92] I find there was a reasonable basis to exclude Professor Edwards from the selection panel and the decision made by DVC Stefanie Rixecker was in all likelihood correct. Dr Gibbs had communicated with Professor Edwards about his concerns during the consultation phase as set out earlier. Further as Dr Gibbs said in his written evidence his concern was that it appeared that Professor Edwards had already decided Dr B, who had been his personal employee for several years, was not included in the consideration as to the second person to be appointed⁷. In short Dr Gibbs had a view Professor Edwards considered the competition for the three positions to be between him and Professor A, the senior lecturers only.

[93] Professor Edwards was Head of Department and in that role would have had a very good understanding and knowledge of Dr Gibbs' performance in his role and on a selection panel where such an important decision is to flow from scoring that sort of knowledge is important. Dr Gibbs said that Professor Edwards was not able to advise the panel about his scoring in teaching from teaching evaluations, his preparation of course outlines and the time to graduate PhD students in animal science compared to other disciplines. This he says disadvantaged him. The University does not accept any disadvantage to Dr Gibbs from Professor Edwards' exclusion from the panel.

[94] Ms Gibson submits that there is no evidence that Dr Gibbs was disadvantaged in the circumstances and that the three individuals on the panel had in excess of 80 years academic experience to ascertain the output of the staff member against the generic criteria. Further she submits that Dr Gibbs had knowledge that Professor Edwards would not be on the panel well in advance of the 3 July 2014 meeting and those concerns if he genuinely held them could have been raised at that time.

[95] Dr Gibbs could indeed have raised concerns between 23 June and 3 July 2014 however this was a stressful and, the evidence supports, very busy period for him. He was preparing for an interview that would determine whether he was selected for redundancy.

⁷ Professor Edwards in his letter in reply to Dr Gibbs concerns did confirm that there were 3 positions in the selection pool.

[96] There is no clear evidence of disadvantage to the point where I could conclude Professor Edwards' involvement would have made a difference. The provision of information throughout a restructuring process is very important. It reduces suspicion and concern about why a particular decision has been made particularly in circumstances where it was known Dr Gibbs was concerned about discussions Professor Edwards had had with another staff member about selection.

[97] Good faith obligations I find did require that Dr Gibbs and Dr A and Dr B should have been advised of an intention to exclude Professor Edwards from the selection panel and the reasons why. There would then have been an opportunity for Dr Gibbs to raise any concerns that he may have about that exclusion and information/knowledge availability to the selection panel.

Was the selection process fair and reasonable?

[98] Dr A, Dr B and Dr Gibbs are skilled and highly regarded academic staff members. A selection process in those circumstances is always difficult. The University concluded that the two roles remaining could be filled by either a lecturer or a senior lecturer.

[99] Dr A and Dr Gibbs are senior lecturers and Dr B a lecturer. DVC Stefanie Rixecker said in answer to a question from the Authority that what was being looked for in the two remaining roles was *for the best people within the career place they are in*. Ms Gibson submitted, in relation to submission and/or evidence that the best person for the job should have been selected; the job in question was either a role of Lecturer or Senior Lecturer.

[100] DVC Stefanie Rixecker said in evidence that to ensure a fair assessment at the appropriate academic level the scores for each criterion aligned with the normal expectation of the level of the position. The scoring was undertaken on a rating scale of 1 – 5. A score of 1 indicated there was no evidence of requirement or preference being met. A score of 5 was given where the requirement/preference was significantly exceeded.

[101] Dr B was scored on the basis of performance as a lecturer. If it was concluded that performance as a lecturer when assessed against the criteria was good or exceeded requirements then she scored accordingly. Dr B was not compared with Dr A or Dr Gibbs. Dr A and Dr Gibbs were assessed on a different basis as senior

lecturers. DVC Stefanie Rixecker said in her evidence that this approach is a common one in Universities.

[102] Dr Gibbs, as is evident from his surprise and concern about his scoring compared to Dr A and Dr B did not know the scoring would be on the basis set out above. I do not find that was clear from the information provided during the consultative phase and up to the interview with the selection panel on 3 July 2014 -*the depth and balance of responsibilities will change in relation to the seniority and development of the staff member.*

[103] It was fair that Dr B was scored against the criteria taking academic level into account. It is difficult to see though how the selection process could be fair and reasonable in the absence of any comparison of relative scorings where three positions were reduced to two and one position was therefore redundant.

[104] I have considered as an example the scoring for the criteria about supervision of postgraduate students. Dr B scored 5/5 for this criteria and Dr Gibbs scored 3.5/5. Dr A who it was noted needs to *take on more postgrads*, scored a 3/5. The senior lecturers both met but not strongly the requirements under this criterion and scored very similarly. The close scores of the two senior lecturers is somewhat surprising. There was a concern by the panel of the time taken to complete PhD students by Dr Gibbs although Dr Gibbs explained in the animal science area it is very difficult to complete students within the three years. That did seem to have been accepted as an explanation by the selection panel but the score remained unchanged. If there were other administrative issues I am not satisfied that these were discussed with Dr Gibbs at his meeting with the panel on 3 July 2014 so that he could properly answer them.

[105] Dr B significantly exceeded the requirements because she was not being assessed in the same way but rather at the level of a lecturer. It was noted in a summary of the selection panels' consideration that Dr B had a *large number of postgrads- larger than a lecturers' load and no administration issues.*

[106] What was significant, objectively assessed, was that Dr Gibbs was the only applicant to have completed PhD students for whom he had direct responsibility with the majority funded through his own research funding. He had explained to the panel that those graduated PhD students were now gainfully employed in science. In

contrast understandably at a lecturer level, Dr B co-supervised PhD students and they were current and not completed. It is clearly not an equal comparison.

[107] The selection panel in their written considerations frequently recorded beside Dr B's score performance as a lecturer being *strong or excellent* and there is no evidence to support relative scoring was compared and moderated where appropriate.

[108] There were other protections as well to prevent Dr B and Dr A being disadvantaged by Dr Gibbs longer tenure. Dr Gibbs was restricted in what he could provide by way of evidence to support the various criteria to three years to be fair to other candidates. That did I find at times disadvantage him.

[109] It is fair and reasonable to take steps in a selection process to reduce disadvantage but care has to be taken not to in trying to level the playing field tilt it in favour of one applicant in the process.

[110] Objectively assessed the selection process of two senior and one lecturer without any comparison of respective scoring and moderation where required was unfair and unreasonable. It did not result in even handed scoring on a fair basis objectively assessed. It was not what a fair and reasonable employer could have done in all the circumstances and it disadvantaged Dr Gibbs.

Merits of selection

[111] Before the individual meetings with each applicant and the selection panel on 3 July 2014 Dr Gibbs and Dr B received the same total points of 65.5. Dr B's score then increased after that meeting with the selection panel by 1.5 points. Dr Gibbs' score did not. Dr Gibbs received a final score of 1.5 points less than Dr B. His total points were 65.5 points and Dr B received 67. Dr A received 71.5 although he was the only applicant who was able to score above a 1 on production of patentable products and he scored 4 for that. Had that not been the case then the scoring would have been very similar.

[112] Dr Gibbs in his interview on 3 July 2014 and subsequent correspondence with the selection panel took significant issue with his scoring under the criteria. He considered his own scoring against each criteria was been *drastically reduced*. Ms Gibson in her submission does not accept that but says that the selection panel made an independent assessment and scored Dr Gibbs lower than his self-assessment.

[113] Dr Gibbs is known nationally in New Zealand as a researcher and he has obtained considerable funding for research. He spoke at length to the panel about his research programme and demonstrable outcomes which had already been set out in detail in his self-appraisal. He referred within the three year period to his *substantial peer reviewed publication* list including at least twice in international peer reviewed literature. He referred to his strong record of completed PhD students who are now employed in science and his teaching evaluations and a formal commendation from the University for being in the top 10% of lecturers. He referred to his developing courses and wider contribution to the University.

[114] Ms Gibson submits that there is no objective evidence that the panel's scoring was wrong or not what a fair and reasonable employer could have done in the circumstances. I accept that the Authority should be slow to interfere with scoring.

[115] There is though limited written information prepared at the material time that supports the scoring from the panel. The handwritten notes from the separate meetings on 3 July 2014 are not full. That may not have been as significant if there had been a record of any panel discussion about the candidates and scoring throughout the process but there was not. The summary of the point's allocation by the panel document was prepared after the preliminary scoring and I find in all likelihood, after and because Dr Gibbs asked for it. There was no record of any panel discussion after Dr Gibbs provided further feedback on 30 July 2014 and the panel made a decision not to change his scores.

[116] Dr Gibbs made it clear at the meeting on 3 July 2014 that he had difficulty understanding the scoring that he felt was inexplicable. A discussion about his concerns was cut short as DVC Stefanie Rixecker wanted to give each of the three staff members equal time for interviews. Dr Gibbs asked if he could provide written feedback on the matters discussed but DVC Stefanie Rixecker advised that the panel had notes. Dr Gibbs when he requested and obtained the notes did not find they were full notes of the discussion. I cannot be satisfied his scoring was canvassed fully as was envisaged by the selection process.

[117] Dr B had points increased by 1.5 after meeting with the panel on 3 July 2014 but there was no separate record of the panel's discussion about this change and the reason for it. This was significant because until that point in time the scoring for Dr B

was equal to Dr Gibbs. Ms Gibson submits that there is an objective basis for the increase but Mr Twomey submits that there is not.

[118] There was a one point increase for Dr B under the teaching criteria after the meeting on 3 July 2014 although that scoring was 0.5 for two separate criteria under teaching. The first was under the criterion *demonstrated effectiveness in teaching*. The panel initially increased Dr B's score for teaching by 0.5 of a point from Dr B's self-assessment to 3.5. That of itself is perhaps unremarkable but the panel must have had some information at that time as a basis for arriving at that higher score which was the same score Dr Gibbs received for teaching. The selection panel then increased the teaching score for Dr B after 3 July 2014 from 3.5 to 4. DVC Stefanie Rixecker said that additional teaching evaluations became available on 3 July 2014 as did additional information about teaching from Dr B.

[119] From the teaching evaluations I saw some negative comments attributed to Dr B. I accept Ms Gibson's submission that DVC Stefanie Rixecker in her evidence said that the statements in the teaching evaluations were *qualitative* in nature and could have been made by one student. That may be so, but objectively assessed, there were more positive comments about Dr Gibbs' teaching from the evaluations and Dean McKenzie accepted in his evidence Dr Gibbs was a good teacher. Dr Gibbs also provided further teaching evaluations to the selection panel before his scoring was finalised but there was no change to his score for teaching which remained at 3.5. Dr Gibbs provided clear examples with his self-appraisal of his teaching and teaching styles.

[120] DVC Stefanie Rixecker responding to Dr Gibbs' further feedback on 30 July 2014 on 1 August 2014 acknowledged the teaching evaluations which included a recently completed evaluation but said they did not provide *substantively new information* to warrant a change. I could not be satisfied that there was an objective basis for the difference in scoring between Dr Gibbs and Dr B for teaching and the increase to Dr B's score.

[121] The other changes made to Dr B's scores after 3 July were ones that I could not be satisfied were because of the provision of new information. A 0.5 increase was made to Dr B's score following the meeting with the panel on 3 July 2014 under *evidence of design and developing academic course material for students*. This was because of *new information* provided about developing courses for *AgriOne*. This

information about developing courses for *AgriOne* was already before the panel in the material provided by Dr B with the self-appraisal form – see curriculum vitae. It was not new information but I accept may have been elaborated on. Dr B had initially self-assessed as a 3 for that criterion and that had been the mark initially given by the selection panel. That was then increased to 3.5 after 3 July 2014.

[122] There was another 0.5 increase after the 3 July 2014 meeting to Dr B's scores to *positive contribution to administration and development of the Faculty* from 2.5 to 3. That was the same score as Dr Gibbs. The reason in the summary of points is based on information in the curriculum vitae submitted by Dr B with the self-appraisal. The basis for this subsequent increase after meeting with the selection panel on 3 July 2014 therefore is objectively unclear.

[123] Dr Gibbs scores remained unchanged despite the meeting with the selection panel and written lengthy submissions with some new information. There was no change to Dr Gibbs' scores for reasons in the main that it was considered by the panel there was no new information or no substantively new information provided to warrant a change. There does not objectively assessed appear to have been even handed treatment of Dr Gibbs.

[124] A decision that Dr Gibbs had been tentatively selected for redundancy was made on 4 July 2014 by the selection panel.

[125] Objectively assessed I am not satisfied that the scoring from what I have found was an unfair process was what a fair and reasonable employer could have done in all the circumstances.

Decision confirmed

[126] On 17 July 2014, Dr Gibbs emailed Ms Sinclair-Hyde and asked for the selection panel's written feedback to the other two applicants along with their application for the position. Dr Gibbs said he wanted that information before he provided his written feedback to the preliminary decision as the process allowed him to do.

[127] Ms Sinclair-Hyde sent an email to Dr Gibbs on 17 July 2014 advising that she would check but that she 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 available to other unsuccessful individuals if they requested it. He also requested the *means of the panel determining the 'TOTAL points' displayed on the return self appraisal form be explained in detail, in writing, please.*

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

[129] 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 Dr Gibbs providing feedback was extended to 4pm on 23 July 2014 and any meeting to provide further feedback would need to be within that timeframe.

[130] 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 4pm for him to provide feedback. At that time Dr Gibbs was in Central Otago undertaking research.

[131] 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 the tentative selection, the selection panel have now reached a final decision to confirm your selection.*

[132] 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 Stefanie Rixecker and Dean McKenzie with the extension to 30 July 2014 then being granted.

[133] Mr Twomey submits that there was predetermination of the decision before feedback from Dr Gibbs was provided. I find in all likelihood a firm view had been reached about who was selected but there was then consideration of Dr Gibbs' submissions dated 30 July 2014 which were received by the selection panel on 31 July 2014 in the afternoon. As already set out though there are no notes from that panel discussion. In her evidence, DVC Stefanie Rixecker said that the selection panel discussed and reviewed each criterion in light of the information received from Dr Gibbs but did not deem it appropriate to alter the preliminary decision of the panel. Dean McKenzie in his evidence could not recall where the meeting was. Professor Fleming participated by telephone.

[134] It was confirmed that the scoring would not be altered in a letter from DVC Stefanie Rixecker dated 1 August 2014. Given the comprehensive nature of the submissions from Dr Gibbs the period for consideration of them was quite limited and supports in my view that a firm view had earlier been reached by the selection panel.

[135] On 1 August 2014, DVC Stefanie 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 was redundant.

[136] I accept there was some pressure on Dr Gibbs with the timeframes. I find that this was particularly when he received the other candidates scoring and then the selection panel total points. I do not find though that more time would have had a significant effect on the outcome.

[137] Dr Gibbs was given formal notice of redundancy on 5 September 2014 and his final day of employment was 5 December 2014. DVC Stefanie Rixecker and Dean McKenzie were concerned that Dr Gibbs disengaged from any further meetings to explore other options to compulsory redundancy between 5 September 2014 and his final day of employment.

Was Dr Gibbs' dismissal for reason of genuine redundancy?

[138] I have found that actions of the University at various stages of the process were not what a fair and reasonable employer could have done in all the circumstances. They were unfair and unreasonable and not in accordance with good faith obligations. I do not find that the decision to dismiss Dr Gibbs was justifiable or that his position was selected for reason of genuine redundancy. He has made out a personal grievance that he was unjustifiably dismissed and is entitled to consideration of remedies.

Remedies

Contribution

[139] Under s 124 of the Act the Authority must consider whether the actions of the employee contributed to the personal grievance and if the actions so require the remedies are to be reduced.

[140] In order to be taken into account as contributing behaviour the actions of the employee must be causative of the outcome and blameworthy. Dr Gibbs disengaged from communication following advice of selection for redundancy. I do not find that disengagement, whilst unfortunate, was causative of dismissal. There was no evidence of a redeployment option within the University. Whilst there was a possibility that discussion may identify such an opportunity I find on the balance of probabilities that would be unlikely and I note a discussion that did take place between Dean McKenzie and Dr Gibbs involved an enhanced retirement package.

[141] I do not find that Dr Gibbs contributed towards his personal grievance.

Reinstatement

[142] The remedy of reinstatement is most important to Dr Gibbs. It is strenuously opposed.

[143] Under s 125 (2) of the Employment Relations Act 2000 the Authority may, whether or not it provides for other remedies provide for reinstatement if it is practicable and reasonable to do so.

[144] Reinstatement is no longer a primary remedy. The Employment Court in *Angus v Ports of Auckland Limited(No 2)*⁸ stated:

[65] Even although practicability so defined by the Court of Appeal very arguably includes elements of reasonableness, Parliament had now legislated for these factors in addition to practicability. In these circumstances, we consider that Mr McIlraith was correct when he submitted that the requirement for reasonableness invokes a broad inquiry into the equities of the parties' cases so far as the prospective consideration of reinstatement is concerned.

[66] In practice this will mean that not only must a grievant claim the remedy of reinstatement but, if this is opposed by the employer, he or she will need to provide the Court with evidence to support that claim or, in the case of the Authority, will need to direct its attention to appropriate areas for its investigation. As now occurs, also, an employer opposing reinstatement will need to substantiate that opposition by evidence although in both cases, evidence considered when determining justification for the dismissal or disadvantage may also be relevant to the question of reinstatement.

[68] ... The reasonableness referred to in the statute means that the Court or the Authority will need to consider the prospective effects of an order, not only upon the individual employer and employee in the case, but on other affected employees of the same employer or

⁸ [2011] NZEmpC 160, [2011] ERNZ 466.

perhaps even in some cases, others, for example affected health care patients in institutions.

[145] Dr Gibbs in his response affidavit lodged in support of the interim reinstatement application dated 19 January 2015 sets out the importance to him of reinstatement and why a compensatory payment will not address his grievance⁹. Dr Gibbs current expertise is in research of ruminant nutrition science and production. The expertise comes from twenty years of veterinary medicine and on farm programmes and in the last ten years highly specialised research work in dairy and beef cattle of the high production, forage only systems of the South Island. This field of research has been his sole focus of research work for many years and has generated his success in the field for which he is recognised internationally. This in turn flows through to his teaching.

[146] DVC Stefanie Rixecker said that the University works closely with Crown Research Institutes who regularly employ or seek to entice staff to work with them and referred to other organisations such as Dairy NZ and Beef and Lamb. Dr Gibbs said working for a Crown Research Institute or industry group removes ability to do non-applied research that he does across many livestock species and would result in the loss of teaching and opportunity for post graduate student development.

[147] If he was to work at Massey University he says that he would have to relocate from the area he has built industry contacts in and there would be the loss of the career in the South Island forage systems.

[148] I accept that the work Dr Gibbs does at the University does not easily transport to other environments and institutions and he would have to get a significantly different job if he is not reinstated.

[149] Ms Gibson submits that the evidence from both Dean McKenzie and DVC Stefanie Rixecker is that the University is meeting its teaching requirements without Dr Gibbs and there has been no teaching that can be allocated to him. Ms Gibson submits that it is not practicable or reasonable to reinstate Dr Gibbs into a position where there is no viable role for him to do.

⁹ Para 15 onwards

[150] Following interim reinstatement Dr Gibbs was advised he would not be allocated any courses to teach but may be required to undertake relief teaching if the need arose. He has been undertaking research and co-supervising a PhD student. The evidence supports research contributes to but does not fully cover the cost of his salary. Dr Gibbs' role is not a research only role and involves teaching.

[151] On 18 March 2015 following interim reinstatement Dr Gibbs wrote to Dean McKenzie and expressed disappointment that he was excluded from teaching and was able to teach immediately.

[152] Dean McKenzie responded by letter dated 25 March 2015 and advised that all teaching for the first semester had been re-allocated but the University was happy for Dr Gibbs to be involved in relief teaching but that did not eventuate. Professor Edwards did organise about six hours of teaching.

[153] Ms Gibson submits that the working relationship between Dean McKenzie and Dr Gibbs has been significantly and detrimentally impacted because Dr Gibbs was critical of Dean McKenzie's involvement in the change process and challenged his decisions. Dr Gibbs may have been critical of some aspects of the restructuring process as it progressed. I have found with respect to some aspects of the process some justification for his concern.

[154] The evidence is that on being reinstated on an interim basis Dr Gibbs behaved in a respectful manner towards Dean McKenzie. Dean McKenzie felt the relationship was still somewhat strained but that is not surprising where the parties are in a legal process. There was an issue raised about *fistulated cattle* and communication about that but I understand that situation may be ongoing and the University will no doubt deal with that matter if it has not done so already.

[155] As was said by the Employment Court in *Massey University v Wrigley*¹⁰ employers generally have almost total power over the outcome in a restructuring and employees may influence the outcome only if they have knowledge and understanding of the relevant issues and a real opportunity to express their views. Some of Dr Gibbs' frustration was because he did not understand the reason for various decisions made in the process. He did not feel that his objections and concerns would be addressed.

¹⁰ [2011] NZEmpC 37 at [47]

[156] I accept there was a justifiable concern by the University that Dr Gibbs disengaged after he was advised that he had been selected for redundancy. He did not respond to a number of requests to meet and discuss alternatives to redundancy. Dr Gibbs should not have behaved in that manner even though he was of the view the process leading to that point had been unfair and he had lost some trust and confidence as a result. Had there been clear evidence before me of a suitable redeployment opportunity such disengagement could have significantly impacted on remedies. There was no clear evidence about redeployment.

[157] I do not see Dr Gibbs' behaviour after advice of his selection for redundancy to be an impediment to resumption of a constructive working relationship beyond politeness with Dean McKenzie. There was no evidence to support difficulties prior to the restructuring process or significant difficulty following interim reinstatement. I would anticipate with the end of the legal process relationships can improve.

[158] The matter that does cause me to pause is the University needed to reduce academic staff in animal science by one because of a reduction in courses and teaching requirements. The University now says that there is no viable role for Dr Gibbs. There is of course for the University the possibility of a further procedurally fair selection process but they do not want to go down that path particularly taking into account the impact that would have on the other individuals involved in the process.

[159] Ms Gibson refers to an Authority determination *Elers v Bartercard New Zealand LP*¹¹ at a statement at [54] that the Authority will not order reinstatement if the likely result would be that the employer would again initiate restructuring leading to an employee's dismissal.

[160] Is it then practicable to reinstate Dr Gibbs? Unlike the situation in the case above I cannot be satisfied that a further restructuring process would lead to Dr Gibbs' dismissal. There was unfairness in this process I have found around the inclusion of Dr Gibbs in the selection pool. The selection process was unfair and unreasonable with limited written documentation to support the scoring. Objectively assessed there was no clear basis for the final increase to scoring on which the decision on selection for redundancy was made.

¹¹ [2015] NZERA Auckland 6

[161] There is some work for Dr Gibbs to carry on with in the research area and he has been doing that. He appears to be gainfully occupied but with very limited teaching. He is willing to undertake any teaching that he is capable of doing and is not averse to going into a different department. I am satisfied that he will be flexible and responsive to deal with the situation that exists.

[162] I do not find that the fact teaching is now covered with one less person should deprive Dr Gibbs of the remedy of reinstatement where the selection process was unfair. The University is not without options and it can undertake a fair restructuring process.

[163] I find that reinstatement is both practicable and reasonable. I make the interim order for reinstatement permanent and I so order.

Lost wages

[164] Dr Gibbs is entitled to reimbursement of lost wages before he was reinstated on an interim basis. I will leave that for Mr Twomey and Ms Gibson to calculate and they may come back to the Authority if required.

Compensation

[165] Dr Gibbs described the process as bruising and that it was a professionally difficult time with enormous uncertainty. He said that outside organisations had heard that the University did not want him and he had suffered professional humiliation. He said that he did not want the matter to end up in a legal process and thought that alerting the University to the errors throughout the process would have resolved matters.

[166] I observed that the matter was stressful for Dr Gibbs. The interim reinstatement order would have gone some way to reducing the hurt and humiliation initially as will the permanent order. I take that into account.

[167] There is a claim for \$25,000 under this head. Taking into account the order for reinstatement I find a claim of \$10,000 is appropriate.

[168] I order the Vice-Chancellor of Lincoln University to pay to Steven James Gibbs the sum of \$10,000 without deduction being compensation under s 123 (1) (c) (i) of the Act.

Costs

[169] I reserve the issue of costs. Failing agreement Mr Twomey is to lodge and serve submissions by 17 August 2015 and Ms Gibson by 31 August 2015.

Helen Doyle
Member of the Employment Relations Authority