

IN THE EMPLOYMENT COURT
AUCKLAND REGISTRY

IN THE MATTER

of a claim for damages

BETWEEN

Rachel Elizabeth Stevenson

Plaintiff

AND

The Chief Executive of The
Auckland University of
Technology (formerly The
Auckland Institute of
Technology)

Defendant

Court: Judge Shaw

Hearing: Auckland
10 August 2001

Appearances: Rodney Harrison QC, Counsel for Plaintiff
Kathryn Beck, Counsel for Defendant

Judgment: 17 October 2001

JUDGMENT OF JUDGE C M SHAW

(1) The plaintiff was employed as a full time permanent tenured lecturer in the commerce/business faculty of the Auckland Institute of Technology (AIT) from 24 February 1993. On 26 June 1997 she was advised that AIT had identified her as being in "a surplus position" and was given notice of her severance from 26 August 1997.

(2) This proceeding is an action in common law brought by the plaintiff alleging that the termination of her employment was in breach of both express and implied contractual terms. Counsel helpfully prepared an agreed statement of issues. These will be examined in turn following an outline of the facts.

The facts

1. The parties

(3) The plaintiff, Ms Stevenson, began as a part-time lecturer with AIT in February 1991. She taught organisation and management in the business/commerce faculty. As her teaching commitments grew over the years she scaled back her work as a systems consultant with a firm of chartered accountants and in March 1993 took up a full time permanent (tenured) position as a lecturer. She successfully completed a 6 months probationary period. As well as full time teaching, Ms Stevenson enrolled for and completed the Auckland University Masters Degree in Commerce (M Com Hons) which involved a formal research component.

(4) Ms Stevenson did not have any formal teaching qualifications. From what she had been told she understood that her performance as a teacher was highly regarded. The defendants did not dispute this. She believed that formal teaching qualifications were not encouraged by her departmental managers and that a graduate diploma in tertiary education was in existence only in the last few years that she was employed at AIT.

(5) Ms Stevenson took responsibility for developing her teaching skills by exploring her interests in pedagogic philosophy including, but not limited to, curriculum design, assessment methodologies, and student support. She did this by assisting with or conducting her own research in these areas. She was also involved in a programme for recognition of prior learning eventually becoming a senior Recognition of Prior Learning consultant. In addition, she was a subject co-ordinator for two teaching teams and oversaw the transformation of course outlines to comply with NZQA requirements for an "outcome oriented curriculum".

(6) Ms Stevenson developed an ETV course on management. This entailed designing a distance learning course, study guide, and co-producing a television programme. She was part of an academic group teaching a fast track version of the Integrated Business Studies degree course for mature part time students. When the commerce faculty developed a Bachelor of Business degree (B.Bus) and produced a profile for a lecturer in that degree she believed that she had met all the required elements.

(7) There was a promotional process under the applicable collective employment contract which allowed for "recognition by pay movement of meritorious performance as well as seniority". Ms Stevenson had observed other colleagues undergoing the process and thought it was demeaning, demoralising, and depressing. She worked to improve the process but did not consider applying for promotion to senior academic staff member.

(8) The defendant is a tertiary institution which since January 2000 has become the Auckland University of Technology. At the relevant time it was still a technical institute and will be referred to by its former name, Auckland Institute of Technology (AIT). The transition from technical institute to university of technology in the 1990's was a factor in this case. Because it was in competition with at least five public and some private providers of similar degrees it was decided to position the AIT business faculty to provide degree level business education with an integrated practical and occupational emphasis. It developed its new B.Bus degree to take able students from lower level programmes who did not have the necessary secondary school qualifications and progress them into degree level programmes. These changes caused AIT to focus on the staff skills and attributes it considered necessary to implement these changes.

(9) This case concerns the changes in the faculty of commerce/business. It comprises nine academic groups ranging from accounting and finance to law. The plaintiff was a lecturer in the management and employment relations academic group. Each academic group is managed by an Academic Group Leader (AGL). The AGLs report to the head of the school, in this case Mr Garry Muriwai, who is responsible for staff planning, recruitment, staff appraisals, conditions of service and discipline, budgetary controls etc. He reports to Mr Graydon, the dean of the business school. Mr Dereck McCormack was AIT's overall corporate services director at the material time. He was responsible for a number of areas including AIT's human resources. Mr Joe Akari was the human resources manager responsible for managing the human resources team and providing human resources support or advice to AIT. He has a post-graduate qualification in diploma of business administration including an endorsement in human resource management. His previous experience included a human resource manager's position in the Forestry Corporation and at Fletcher Challenge Forests. He is experienced in dealing with redundancies.

(10) Although not a party to these proceedings the union to which the plaintiff belonged played a significant part in the redundancy process. Along with the CEO of AIT and employees of the institution including the plaintiff, the Association of Staff and Tertiary Education (ASTE) was a party to the academic staff members' collective employment contract.

2. The collective employment contract

(11) This is a comprehensive document. Material to this proceeding is Part 10 entitled "Surplus Staffing Positions". Clauses 10 to 10.4 are relied on by both parties to support their cases.

10.0 INTENT

The Employer recognises the serious consequences of the loss of employment for employees and seeks to minimise those consequences by these provisions.

10.1 APPLICATION

These provisions apply to employees who have an ongoing expectation of employment. They will not apply to employees who have reached the expiry of a limited-tenure appointment made in accordance with clause 3.1.3 of this contract or to part-time employees.

10.2 DEFINITION

A surplus staffing situation exists when as a result of reduction in funding, course demands, organisational changes or other identified factors the Employer requires a reduction in the number of employees. No existing staff member will be displaced by the appointment of a tutorial assistant.

10.3 PROCEDURES**10.3.1 Consultation**

The General Secretary of ASTE and the chairperson of the local branch of ASTE will be notified by the Employer:

- (i) at an early stage of any reviews of whole, or part of the Institute's organisational structure or function, which may result in significant changes to either the structure, staffing or work practices affecting existing employees;*
- (ii) when there has been a reduction in demand sufficient to affect the structure, staffing or work practices of existing employees.*

The Employer will provide the union with an opportunity to be involved in any review. Should the review confirm a surplus staffing situation, individuals who might be affected will be advised in writing of this and of their right of assistance from ASTE.

10.3.2 Notification

When, as a result of the processes above, specific positions are identified as surplus the Employer will advise the General Secretary of ASTE, the chairperson of the local ASTE branch and the Employees affected not less than two months prior to the date by which the surplus staff are to be discharged. The date may be varied by agreement between the parties.

10.4 OPTIONS

The following are the options to be applied in staff surplus situations:

- (i) attrition;*
- (ii) redeployment;*
- (iii) enhanced early retirement;*
- (iv) retraining;*
- (v) severance.*

The aim will be to minimise the use of severance. Where the other options are inappropriate to discharge the surplus the option of severance will be made available. Employees who are offered a position within the Institute which is directly comparable to their existing positions, which does not require a change in residential location, and who decline appointment will not have access to severance.

(12) Counsel each advanced significantly different interpretations of these clauses which will be dealt with as they arise in the discussions of the issues.

3. The decision to make the positions surplus

(13) In 1997 Mr McCormack was asked to advise AIT's general manager on options to reduce unsustainable expenditure in the business faculty. A Morgan and Banks report was obtained and in May 1997 it was decided a possible surplus staffing situation should be formally investigated. This revealed that two academic groups in the faculty were overstaffed – the accounting group and the management employment relations group. An analysis of staffing ratios, average class sizes, and enrolment trends revealed that twelve positions were surplus in the management employment relations group. This allowed for the retention of a position for an AGL and a part position for a staff member to be released from teaching to do scheduling. The plaintiff does not dispute that AIT had made out a case for making staff redundant.

4. Advice and consultation with affected staff

(14) There was little dispute about what occurred once the decision to make staff redundant had been made. The process was reasonably well documented. The plaintiff's case is focused on the steps taken by AIT following the decision alleging that at critical points it acted in breach of requirements of clause 10 of the collective employment contract. The merits and implications of the following steps will be discussed at a later stage.

(15) A management review team of Mr Akari and Mr McCormack was appointed to manage the surplus staffing review. Mr Akari's role was to investigate employment options for affected staff. He was also actively involved in the consultation process which began on 23 May 1997 with the first briefing meeting between AIT and ASTE representatives. Mr McCormack said, in reliance on his handwritten notes made before that meeting and annotated during it, that the meeting was to confirm how ASTE saw its role in the process. ASTE wanted to be involved in confirming that there was a surplus staff situation and the numbers to be made surplus; determining the criteria for selecting the surplus positions, and identifying the processes by which the surplus staff were identified. ASTE specifically did not want to be involved in the selection of who was to be made surplus but they did want to be involved in monitoring the process as it went along. Checks were then made with ASTE about which staff members they represented. Ms Stevenson was one of these although she disputed the extent of this representation.

(16) An AIT briefing paper was given to ASTE at that meeting. It was entitled "Review of Staffing" and over five pages set out the potential staff surplus and the background to it. The paper listed the four options under the collective employment contract for dealing with surplus staffing: attrition, redeployment, enhanced early retirement, and retraining. The paper then explained that AIT proposed to identify the surplus staff by using a set of criteria

to be determined in consultation with ASTE. The proposal was that the criteria would identify for retention those people who had the most broadly applicable teaching skills.

(17) The ASTE representatives had some concerns about the contents of the paper and asked AIT to edit some parts of it before it was distributed to staff. Although Mr Akari was challenged on this I accept his explanation that it was ASTE's not AIT's choice to edit the document. ASTE wanted its members to focus on the consultation around the review process rather than the selection process and the magnitude of the surplus.

(18) Ms Stevenson said the edited version was distributed to all faculty staff on 26th May. She explained to the Court that it came against a background of significant stress for her. The son of a close friend had become terminally ill earlier in the year and then she became ill herself in May and June taking 2 days' sick leave during this time. In spite of this Ms Stevenson said she became involved in the process "As a responsible member of [her] union". She assisted in the submissions process by analysing figures as they were presented and feeding the analyses back into the consultation with ASTE.

(19) On 3 June there was another meeting between three ASTE representatives, Mr Akari and Mr McCormack during which ASTE questioned whether certain courses ought to be cancelled. A wider meeting between the review team and ASTE members including Ms Stevenson was convened on 6 June. This was to enable the review team to answer a set of written questions submitted by ASTE. Among the 25 questions, AIT was asked to define the subject areas and levels where it was proposed that there was a surplus of staff. The answer to that was "If our tentative conclusions are confirmed, the areas of surplus are in Management and Employment Relations, and in Accounting and Finance across levels 2-6". On 10 June Mr Akari wrote to ASTE's field officer with a timeline for the surplus staffing review process. This was:

- Closing date for the review 18 June 1997.
- Staff to be advised of outcome of review process by 24 June.
- If surplus staffing was confirmed notice to staff in surplus positions would begin on 26 June.

(20) This memo also said:

- ... *The selection of any surplus staff will be based on skills criteria that will ensure:*
 - *that the Faculty maintains its capability to deliver programmes and services into the future*
 - *that selection is fair and objective.*

(21) On 11 June Mr Graydon sent a memo to all staff in the Faculty of Commerce to update them on the staffing review. It advised of meetings with ASTE and its members and

confirmed the timeline for the review which would identify surplus positions. The memo offered counselling and support services.

(22) On 17 June staff in the commerce faculty/management and accounting disciplines were advised of a 2 hour workshop entitled "The Change Process" to assist staff affected by the review. It was to focus on coping strategies. ASTE was advised of ongoing counselling services, a career transition management workshop and individual outplacement support.

(23) ASTE members, including Ms Stevenson, prepared a template called "Summary of Skills and Capabilities" which staff could use to present their skills and attributes as shown on their personal files. The template was distributed on 19 June. But Ms Stevenson did not complete one herself. She said:

Prior to the announcement of the actual number of surplus positions, I had not worried at all that my own position might be in jeopardy. It was a measure of my confidence in the self-evident nature of my demonstrated skills that it did not occur to me to complete the Summary of Skills and Capabilities form which I had helped design. I had an up-to-date research Masters degree in Management (with honours) and was heavily engaged in research and producing regular research outputs – something I knew (or thought I knew) to be highly valued by AIT. I was regularly scheduled to teach on the degree programme – which I felt meant that it was accepted that I had met the rigorous published criteria re teaching skills and capabilities for degree teachers. I also knew that my curriculum and policy development capacities had been extensively demonstrated and were highly regarded by a number of managers within AIT.

(24) A meeting was held with ASTE on 24 June. Mr McCormack went through AIT's response to the questions from ASTE. The selection criteria were discussed and in particular the weightings to be applied to each criteria. ASTE representatives also raised the issue of enhanced early retirement. They wanted AIT to consider giving at least one staff member the option to leave by way of retirement rather than face severance.

(25) On 24 June Mr Graydon sent a further memo to all staff. This is an important document. The defendant relies on it as evidence of compliance with clause 10 of the collective employment contract. The plaintiff says it is no such thing. The document reads:

TO: *All Staff Members – Commerce Faculty
All Corporate Directors
All Deans
John Hinchcliff, President
Jonathan Blakeman, General Manager
ASTE – Branch Chair*

...
This memo advises the outcome of the review of surplus staffing.

The institute met with ASTE on Friday 23 May 1997 to begin discussions on a possible surplus of staff within the Commerce Faculty. The review of surplus staffing has involved meetings with staff and ASTE representatives and the consideration of written submissions. It also involved a review of faculty enrolments and staffing commitments.

The outcome of the review of surplus staffing is as follows:

1. Accounting

There are two surplus positions in the accounting discipline. I am pleased to be able to say that both of these positions are able to be dealt with through attrition. Accordingly, there are no further actions necessary following from this review.

2. Management & Employment Relations

I regret to advise that the institute has determined there are twelve surplus positions in the management and employment relations disciplines. This number does not include limited tenure contracts which terminate at the end of semester one.

On Thursday, individual staff members who teach in the management discipline will be advised of the outcome as it affects their position.

Skills-based criteria will be used to ensure that those with the most broadly applicable skills are retained. The criteria balance teaching qualifications, academic qualifications, research qualifications and teaching experience across a range of levels and subjects.

Please be assured that the institute is taking steps to support affected staff through this difficult time.

*Des Graydon
Dean*

(26) ASTE asked that staff be advised of the weighting percentages for each criteria. Mr Graydon left a voice-mail message on staff phones advising that these were evenly balanced with one third allocated to teaching qualifications, one third to academic and research, and one third to teaching experience. Ms Stevenson recalled there being a voicemail from Mr Graydon. She remembered that it was vaguely related to criteria but apart from that didn't remember what the content of the voicemail was and could not say that she got it on 24 June. There was no other notification to effected staff about the specific criteria and/or weightings which were to be applied until after the decisions were made. Mr Graydon accepted that after he left the voicemail the criteria were changed by adding a new criteria of special responsibilities. He regarded any other changes to the criteria as only fine-tuning.

(27) Mr Akari sent a memo on the same day to the teaching staff in the management employment relations disciplines and enclosed a form for them to nominate their preference as to how they would like to be individually notified on Thursday. Mr Akari also advised that after notification there would be further opportunities to discuss options and support programmes.

(28) Ms Stevenson was highly critical of this part of the process. She said she did not receive notification under clause 10.3.1 advising her as an individual of the fact that she was affected or of her right to be assisted by ASTE. She did not regard the 24 June memo as advising her that she was personally affected. She says that had she properly been made aware she would have sought to make representations to AIT about the alternative options to severance and the applicability of the criteria to her. She believes that she had material

that would have been helpful to her case. She also wanted to comment on the appropriateness of the selection criteria including the necessity for giving credit for research completed by staff members. At least she wanted an opportunity to clarify what "tertiary teaching qualifications or equivalent" meant and its relationship with the other criteria. Neither she nor any other staff were advised of changes to the criteria notified on 24 June.

5. Selection criteria

(29) It is a major part of the plaintiff's case that some or all of the selection criteria were irrelevant, unfair, not objective, and not constant. Mr McCormack said that AIT had opted for a selection method using skills based criteria and discussed this with ASTE. The evidence shows that criteria went through a number of changes. The first proposed set of criteria was in the briefing paper to ASTE representatives. These were:

- 1 *Teaching qualification or equivalent*
- 2 *Experience at teaching to level 7 in a programme which is continuing to be offered.*
- 3 *Postgraduate degree in the discipline taught.*
- 4 *Relevant research based degree or equivalent*

(30) ASTE responded with its views about the type of selection criteria necessary to provide the faculty management with the flexibility it was seeking in the remaining staff. It also asked for points to be included for staff who carried special responsibilities. It was informed that management would consider the principles which ASTE had outlined.

(31) The 24 June memo told staff that:

The criteria balance teaching qualifications, academic qualifications, research qualifications and teaching experience across a range of levels and subjects.

(32) AIT's witnesses said that the final criteria which were actually applied were those set out in the memo sent to the surplus staff on 26 June advising them of the points that they had received and that these criteria had been settled by the AIT management review team of Mr Graydon, Mr Muriwai, Mr Akari, and Mr McCormack on 25 June. These criteria were:

- Teaching qualifications or equivalent with a principal lecturer gaining full points, senior lecturer 0.75
- Postgraduate degree in the subject taught
- Research degree in the subject taught or equivalent
- Experience teaching at level 7
- Special responsibility in the faculty or current experience teaching in another discipline for which there are ongoing classes

(33) Mr McCormack gave evidence about each of the selection criteria and how they were weighted was:

*With regard to **teaching qualifications**, those people who had a secondary teaching diploma or certificate, either through a Teachers' College or Polytechnic initial training programmes, or who had demonstrated equivalence in the AIT promotion rounds were to be awarded most of the teaching qualification points (75%). (In the*

end most met 75%). Those people who had been promoted to principal lecturer, the highest promotion level at the Institute, would receive 100% of the teaching qualifications given that the weight of the Institute promotion criteria is for teaching practice.

...

With regard to **teaching experience** we were looking for people who had experience of teaching at the highest levels. (We referred to this as level 7 which was the level of courses in the final year of a Bachelors degree). Our rationale was that proven experience at this level would mean capability throughout the range of programme/course levels and therefore greater flexibility and highest value to the faculty. Hence the test for receiving the 1/3 of the points allowed for teaching experience came to be whether someone had had experience of teaching at level 7 on subjects that we continued to offer or in similar courses to these.

Research qualifications started off as being a post graduate degree. However early on it was identified that a post graduate degree which was entirely papers based did not have a strong connection to research capability. Nevertheless it was accepted that postgraduate qualifications should be considered irrespective of this, as they added to the credibility of staff. This criterion was therefore divided into 2 parts:

- (a) One part for post graduate degree; and
- (b) The second part for a research based post graduate qualification or, as an equivalent, research activity resulting in outputs in the Institute's formal research reports, or, as a further equivalent as post graduate degree in a **directly** relevant field which although papers based would provide a spring board for scholarship in that field.

...

The final element of the selection criteria was related to **work in an academic administration or leadership position, or the proven capability to teach across a range of disciplines**. Again the matter was raised by ASTE at a late stage when they asked us to reconsider their section of their formal submission on selection criteria. To fit in new elements, the whole criterion scheme was converted to percentage points. 10% was awarded for a faculty wide position for which a special responsibility allowance was paid under the CEC. Alternatively, the 10% was awarded to people who could teach across a range of disciplines – that is, more than one.

This resulted in a criterion pattern of: teaching experience at level 7 with 30%; teaching qualifications – a teaching diploma or certificate or promotion to senior lecturer within the Institute with 22.5%, or, 30% for principal lecturer promotion; 7.5% for more than half of a post graduate degree or 15% for a completed one; 15% for a research qualification or for research outcomes; and 10% for faculty administration, or a management leadership position, or the ability to teach across disciplines.

(34) Mr Akari's evidence was that the final criteria, i.e. the 25 June criteria, were applied without amendment or alteration. He accepted that when they were working through the selection process they used fuller definitions but he said that the essence of the criteria stayed the same. Ms Stevenson did not receive advice of the actual criteria used for determining her redundancy and the points awarded to her until she received a memo from Mr Graydon on 2 July. This was 5 days after being told she was redundant.

(35) Ms Stevenson said the change in the wording from "teaching experience to level 7" to "teaching experience at level 7" is significant. She believes that the first version would have given her points whereas the second deprived her of any. She was also particularly

aggrieved by being accorded no points whatsoever for teaching qualifications. She pointed out that reference to "teaching qualifications" varied in numerous documents:

- Memo dated 24 June 1997 to all staff - "teaching qualifications."
- Following AIT's response to submissions made by ASTE dated 24 June 1997 - "tertiary teaching qualification or equivalent."
- Attachment to Memo dated 25 June 1997 from Mr McCormack to Mr Blakeman – "teaching qualification."
- Memo dated 26 June 1997 from Mr McCormack and Mr Graydon to Ms Stevenson re surplus staffing notification - "teaching qualification."
- Memo dated 1 July 1997 from Mr Graydon to Ms Stevenson re surplus staffing criteria which had three references to teaching qualifications:
 - (paragraph 1) "teaching qualifications."
 - (weightings) "Teaching qualification or equivalent with a principal lecturer gaining full points, senior lecturer 0.75."
 - (criteria) "Teaching Qualification."

(36) Ms Stevenson says that it was not clear whether in order to gain points a staff member needed to have one teaching qualification or several teaching qualifications, neither was it clear whether teaching credentials needed to have been assessed at tertiary level and, if so, whether these needed to be tertiary qualifications based on experience or by a formal tertiary teaching qualification.

6. Application of selection criteria

(37) Mr Muriwai and Mr Akari were involved in the allocation of points to individual staff members in the management and employment relations group. Mr Muriwai said it was a methodical process using the information held by AIT about each person. He was challenged about the information which they had used and conceded that as well as documented information on each staff member he also used his own personal "insider" knowledge about individuals to assist in allocating the points. He felt that he had an overall understanding of staffing and the people involved in the academic group and he would have been surprised if there were things he didn't know about staff members because of his involvement in interviewing staff for their jobs, his knowledge of people who had done masters degrees, and from working closely with others.

(38) Mr Akari said that the selection process started in his office where all the staff personnel files were kept. A computer spreadsheet was developed on a laptop computer onto which the decisions were recorded. They began with a preview of all staff files and then went to Mr Muriwai's office where they could access other records such as teaching

timetables and payroll information not held on the personnel files. This information was added to the spreadsheet. At the same time Mr Muriwai supplemented the written information with his own knowledge which Mr Akari said informed them about the appropriate allocation of points for the research outputs of staff.

(39) Mr Akari was cross-examined about this process and in his closing submissions Mr Harrison submitted that Mr Akari made a concession that the application of the selection criteria was neither fair nor comprehensive if the individuals who were doing the assessments had different interpretations of the criteria that were being applied. I conclude that Mr Akari believed that throughout the redundancy process he acted in a way in which he genuinely regarded as fair and reasonable. He saw his role as being one of supporting staff as much as possible and as such being a good employer. He also said that being a good employer is also thinking about the future of the organisation and what skills are required to be retained. I do not take Mr Akari's evidence to be a concession that AIT's application of criteria was unfair. He agreed that it would be unfair if there were different interpretations between members of the team but qualified that by saying that the intention was to try and remove subjectivity from the process by using objective criteria fairly.

(40) A 2-hour meeting with Mr Graydon, Mr McCormack, and Ms Bygrave (Head of Programmes) followed during which Mr Akari and Mr Muriwai spoke about how the points had been allocated for each individual. They all considered the spreadsheet and the results as they were allocated. There was an evidential issue about whether the spreadsheet had been developed by Mr Muriwai and taken to Mr Graydon or whether Mr Graydon developed his own. I accept Mr Muriwai's explanation that Mr Graydon began work on a template for the spreadsheet, Mr Muriwai took a copy and put it on his laptop and that is what Mr Akari and he worked on. Any discrepancies in evidence between Mr Graydon and Mr Muriwai about this were obviously the result of memory lapses after a long period of time. Credibility was not in issue in any significant way.

(41) Mr Graydon said he worked closely with the other members of the review team. He left the initial allocation to Mr Akari and Mr Muriwai but approved these after discussing each individual and their points. He accepted responsibility for the process of allocation of points. He agreed that he was reliant on what he was told by Mr McCormack in areas such as whether a staff member's post graduate degree was "in the subject taught" or not, or whether it was research based or not.

(42) AIT's witnesses were closely questioned about how points were allocated to Mr Pasley a staff member whose application to take enhanced early retirement was refused and who was not made redundant. Mr McCormack was asked for the reasons for the

refusal. His view was that if voluntary retirement was offered to one person it would have to be offered to all. Mr Akari's view was that voluntary severance presented too many risks in terms of the skill mix that AIT might end up with. In other words AIT was concerned that if staff were offered voluntary severance then it might lose some of its well qualified and best teachers and end up with staff who could not perform well in the new environment.

(43) Application of the selection criteria to the staff resulted in each of them receiving a total number of points. The eleven staff members with the lowest points were declared to be surplus. This meant that all staff with points less than 53 would lose their positions. Of those staff Ms Stevenson and one other had the highest points at 30. She received no points for teaching qualifications, the full 15 points for a post graduate degree, the full 15 points for a relevant research based post graduate degree, no points for experience for teaching at level 7, and none for special responsibilities.

(44) Ms Stevenson believes that the way all the criteria were applied was unfair and was critical of three in particular.

(45) **1. Teaching qualification:** Ms Stevenson maintains that no staff were actually awarded points for having an actual "teaching qualification or equivalent". Staff who obtained points for teaching qualifications had them allocated to them for their titular seniority. She maintains that this is quite a different thing from what the criterion purports to be - a teaching qualification. She accepts that she does not have a tertiary or a secondary teaching qualification or a graduate diploma in teacher education although she subsequently found out that she had completed all the prior learning requirements for such a diploma. Even if her achievements of being a Recognition of Prior Learning Consultant and completing a thesis on the tertiary teaching sector were not accepted as formal teaching qualifications, she says that at the least they should be regarded as equivalent to a tertiary teaching qualification. Her belief is that she had demonstrated that she had the skills and capability required for AIT's own graduate diploma of teaching education (tertiary) and that her managers should have been aware of that and should have taken it into account in assessing her points under that criterion.

(46) **2. Teaching experience:** Ms Stevenson was highly critical of the application of this criterion. Her view is that by allocating 30 points for teaching experience (criterion 4) only to those teaching at level 7 and 30 points for teaching qualifications (criterion 1) only to staff who were principal lecturers enabled them to "double dip". In other words, she is concerned that regardless of their skills senior staff got maximum points by reason of the position they held. She said this had the effect of promoting their chances of retention at the expense of other staff of broadly applicable skills.

(47) **3. Special responsibility:** Given the wide range of activities that she was involved in outside her teaching duties, Ms Stevenson cannot understand why these were not taken as an indication of her ability and willingness to take on special responsibilities. She did not know that points under this last criterion were only given if the staff member was receiving a special responsibility allowance. She accepts she could not be allocated points for current experience teaching in another discipline (also part of criterion 5) but says that this is only for want of an opportunity which could only be given through management prerogative.

(48) In summary, Ms Stevenson said that she should have been allocated 30 points under criterion 1 for teaching qualification or equivalent because of her Senior Recognition of Prior Learning Consultant's certificate and her thesis which was teaching related. At least, she believes that AIT's acknowledgement that she fitted the B Bus lecturer's profile should have earned her 23 points. If she had received 23 points she would have reached the cut-off level of 53. She accepts that does not necessarily mean she would not have been made redundant but at least AIT would have had to give consideration to other criteria under which she may have been successful. She is angry that AIT did not disclose to her the sources of information it used to assess her skills and capabilities nor other information about the allocation of her points which she regards as important.

7. Events after the identification of plaintiff's position as surplus

(49) When the process was complete Mr McCormack submitted a list of staff to the general manager, Mr Blakeman, with a recommendation that he approve the termination of the employment of those listed on the grounds that they were surplus to requirements in terms of the relevant employment contract.

(50) On 26 June Ms Stevenson's personal copy of "Surplus Staffing Notification" was placed in her mailbox. Because of work commitments she decided to wait until she got home that evening to read it. She discovered then that she was one of the staff members who had been identified as being in a surplus situation.

(51) The surplus staffing notification letter said, "We must regretfully advise you that you are one of the staff members who has been identified as being in a surplus position." Ms Stevenson said that no amount of preparation could protect her from the shock of such a statement and, since she had no sense that her own employment might be in jeopardy until 2 days' previously, she was deeply shocked. She regarded the skills assessment process as arrogant and abusive and was in such shock that she didn't think to ask questions about processes or whether she could appeal against it if she felt there had been an error. She said that the process took place while she was in the middle of marking exams. Early the following week she wrote a letter to the human resources manager telling him that she had

been caused much distress and grief by the institute's actions. She said she felt she had no alternative other than to leave but expressed the view that the staffing review process had not been fair, honest, or truly consultative. She criticised the criteria used and how they had been applied. She said that her shock was increased when she read the 1 July memo containing the actual criteria and the allocation of points.

(52) It should be noted that the 26 June letter also outlined options in support programmes. These included an offer to refund all actual and reasonable retraining costs up to a total value of 10 percent of the severance payment as well as assistance with redeployment of possible and enhanced early retirement. Counsellors, career transition management workshops and outplacement supports were also described. Employees were told the review did not reflect on their performance or contribution and were offered a reference. It attached details of severance payments calculated in accordance with the contract which included salary in lieu of notice of 1 month.

(53) Ms Stevenson accepted the offer of retraining costs and registered for the career transition management workshop.

(54) Ms Stevenson said that in losing her job she lost her academic tenure, forfeited a position which she valued, and found it difficult to obtain a job in the six months following her dismissal. She applied for a total of 57 jobs and, although short-listed for four of these, was unsuccessful. She did not receive her present part time position until July 1998. She therefore lost her regular income and the flexible working hours which she valued. She also was not able to teach, which she enjoyed, and felt that she lost her academic reputation. To balance that she immediately decided that she would take the opportunity to enrol in a masters in commercial law using money from the retraining allocation and commenced that in February 1998 attending 6 hours of lectures a week. She said that, in spite of that commitment, she continued to look for a full time job as she had previously taught full time at AIT whilst sitting for her first master's degree.

(55) Ms Stevenson's mother, Mrs Norton, gave evidence of the effects of the redundancy on her daughter. She said that she suffered a tremendous sense of confusion, a loss of confidence in her own judgement and a crisis in terms of her own belief in her ability to teach. She said she talked also of being dominated by the feeling of being completely devalued. In Mrs Norton's view the abrupt dismissal of Ms Stevenson had caused her great hardship, economically and also personally through her loss of confidence and subsequent confusion about her own ability and judgement. This evidence was supplemented by that of Mr Webb, the plaintiff's partner, who said that the effects on Ms Stevenson included bouts of depression, low energy levels, a tendency to be stressed by small things, sleeplessness,

migraine headaches, loss of appetite, and a sense of failure. He said that she was plunged into a period of despair that lasted over a year and only began to lessen when she was employed part time by the people's centre a year after being made redundant.

(56) The plaintiff also called evidence from Ms Ella Henry. She had had a longstanding professional relationship with Ms Stevenson dating from the time that she took up her employment at AIT as a lecturer in 1992. She left AIT to become a lecturer in the management employment relations department in the business school at Auckland University. She said that what happened at AIT contrasted very sharply with the procedures for reduction of academic staff numbers adopted by the University of Auckland. In 1998 the University of Auckland took steps to avoid involuntary staff redundancies by introducing a flexible work arrangement, flexible approaches to moving towards retirement options, special leave without pay, and voluntary severance.

(57) Ms Henry spoke highly of Ms Stevenson's personal and professional abilities. She also said that as someone who sat on a number of appointment selection panels an applicant for employment in a teaching position who had been made redundant previously would be viewed less favourably by her given the negative connotations of redundancy.

The issues

(58) With these facts in mind I turn to the issues which counsel agree are at the heart of this case.

(59) In her closing oral submissions Ms Beck invited the Court to stand back from the detail of the contract to see what AIT did in the context of the urgent need for restructuring. She said that if, in spite of AIT's denials, the Court finds breaches of contract these were minimal and must be viewed in the light of the genuineness of the need for redundancies, the fact that AIT was not trying to get rid of particular people and that much effort was put into counselling, workshops, and communicating with ASTE. She submitted that AIT took into account the feelings of the affected staff throughout in spite of tight timeframes.

(60) Mr Harrison relied on both the express wording of the contract which he said established duties which AIT was bound to observe as well as AIT's overall implied duty to be a good employer by acting in a fair and reasonable way.

Issue 1 – did AIT breach its obligation to the plaintiff under clause 10.3.1 of the contract or the implied term as to fair and reasonable treatment?

(61) The plaintiff maintains that AIT breached its duty by failing, after the review, to advise the plaintiff that she was an individual who might be affected and of her right to assistance from ASTE. The defendant says that the plaintiff, as a person who might be affected by the

review, received her advice in the memo of 24 June 1997. The defendant accepts that she was not advised of her right to assistance from ASTE but Ms Beck points out that Ms Stevenson was actually involved with assisting ASTE with their submissions and had been receiving ASTE assistance throughout the review. The defendant's case is that staff had been advised throughout June of what was happening. The 11 June memo was addressed to all staff in the commerce faculty but referred to management and accounting disciplines, and the 13 June memo was specifically addressed to management and accounting disciplines and asking those staff to upgrade their personal records. Ms Beck says that in that context the 24 June memo should be seen as advice to an individual who might be affected.

(62) The plaintiff says that the 24 June notice was inadequate. Ms Stevenson said that it gave her a "slight inkling" that it would affect her. But she also said "I did not regard (the memo) as advice to me that I was personally an individual who might be affected." Having heard her evidence and considered the contents of the 24 June memo I conclude that its contents are phrased in such a way that Ms Stevenson's failure to comprehend that she actually might be affected is understandable. The reasons for this are:

1. The way the selection criteria are described in the memo. They were set out very generally. The criterion of "teaching experience across a range of levels and subjects" was misleading in the light of what was actually applied to individuals. A person in Ms Stevenson's position who had taught across a range of levels and subjects was entitled to assume that she would get credit for this. This perception explains her apparent complacency about her situation. She believed on the basis of the memo that she would not be affected.
2. The memo does not refer to individuals. It is addressed to a wide range of people, including all of the commerce faculty and all deans, and nowhere points out that any particular individual may be affected. The advice given was not sufficient to indicate that she, as opposed to other members of the management and employment relations academic group, might be affected.

(63) Clause 10.3.1 requires that individuals who might be affected be advised. It does not refer to groups or categories of people who might be affected. The last sentence in Clause 10.3.1 reads "Should the review confirm a surplus staffing situation, individuals who might be affected will be advised in writing of *this* and of their right to assistance from ASTE." I have considered whether the word "*this*" refers only to advising the individuals that there is a surplus staffing situation. However that is a narrow interpretation. In Clause 10 AIT recognises the serious consequences of the loss of employment and seeks to minimise

those consequences by the provisions which follow. An interpretation of Clause 10.3.1 consistent with that is that individuals get advice of the fact that they are an individual who might be affected so that they have an opportunity to either come to terms with the possible consequences or take steps to advance their case. Proper advice under clause 10.3.1 should have been addressed to individuals and, in the interests of fairness, given those individuals sufficient information from which they could reasonably conclude that they might be affected by the restructuring. Ms Stevenson is a highly intelligent person who was closely involved with ASTE throughout the review. In spite of this she only had a slight inkling that she might be affected after receiving the 24 June memo.

(64) I conclude that the memo of 24 June did not comply with the requirements of Clause 10.3.1. The defendant accepts it failed to advise individuals of their right to assistance from their union but this is, in the light of the involvement of ASTE on behalf of its members up to this point, technical. No adverse consequences arise from that. The more serious breach lies in the failure to properly address individuals who might be affected in a way that put them on proper notice of this fact. The defendant breached the express words of clause 10.3.1 by not advising Ms Stevenson that she was an individual who might be affected. The defendant has also breached the implied term of fair treatment by not adequately disclosing to the plaintiff the basis on which she was to be evaluated. The aim of the redundancy provisions are to minimise the consequences to staff who were made redundant. Although there is no express term requiring the defendant to advise the staff of the criteria, once it did embark on that it was only reasonable for those criteria to be set out accurately and unambiguously. The consequence of these breaches is the failure to minimise the consequences to Ms Stevenson of being made surplus.

Issue 2 - Is the defendant under a contractual obligation to the plaintiff by virtue of clause 10.3 or the implied terms of fair and reasonable treatment to consult with the plaintiff once she had been identified as an individual who might be affected by an identified "surplus staffing situation" about selection procedures and criteria before any decision was made about these?

(65) Mr Harrison submitted that whether there was a contractual obligation to consult is a question of law and of interpretation of contract and cannot be affected by the conduct of the defendant or of ASTE. That is accepted. He says that Clause 10.3.2 imposes an obligation on AIT to advise employees of specific positions which are surplus although he accepts that Part 10 contains no express provision for consulting about selection criteria with either the union or the individual employee. He posits three alternative interpretations:

1. The contract imposes no duty on the employer to consult with anyone concerning the selection criteria and process.

2. The contract imposes a duty to consult concerning those matters with "individuals who might be affected."
3. The contract imposes a duty to consult with ASTE.

He argues for the second which he says is an express contractual duty because:

- Clause 10.3.1 specifically refers to advice to be given to individuals who might be affected by the staff surplus situation. The giving of advice presupposes that the individuals will be consulted.
- Clause 10.3.1 is headed Consultation and, in the absence of specific reference to when this should occur, the only point it could occur is at the advice stage.
- Clause 10.3.2 "when as a result of processes above, specific positions are identified as surplus" is a reference to consultation. He says a fair selection process must involve notification to individual employees of selection criteria to be applied, an interview or other hearing procedure for each employee at risk, and fair decision making process.

(66) I do not accept that the interpretation proposed by Mr Harrison sits easily with clause 10.3.1. The contractual right to involvement by the union in any review certainly implies consultation between the union and AIT. However, the contract refers only to [advice] to be given to the individuals rather than involvement. The fact that individuals are also to be advised of their right to assistance from ASTE points to the fact that the contract contemplates ASTE's ongoing involvement with AIT in the process. I do not agree that clause 10.3.2 reinforces the obligation to consult with individuals. On the natural and ordinary meaning of the words of clause 10.3 there is no express obligation or duty imposed on AIT to consult with individuals who might be affected about selection criteria or processes.

(67) Is it reasonable to imply such a term? The five test set out in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 16 ALR 363 has been affirmed and applied in a number of Employment Court cases. Terms which are sought to be implied must be:

1. Reasonable and equitable;
2. Necessary to give business efficacy to the contract, this meaning that no term will be implied if the contract is accepted without it;
3. So obvious that it "goes without saying";
4. Capable of clear expression; and
5. Must not contradict any express terms of the contract.

As to reasonableness, the Court must be satisfied that the implied term is one which the parties would probably have agreed if they were being reasonable (*Courtaulds Northern Spinning Ltd v Sibson* [1988] IRLR 305; [1988] ICR 451 (CA)).

(68) I am satisfied that an implied term that individuals must be consulted over the selection criteria and processes could contradict the express term of the contract relating to consultation with the union. I also find that the parties would probably not have agreed that it was reasonable. The express involvement of the union at critical points of the process points to the employer seeing itself as dealing with individuals through their union. Even when individuals are mentioned it is in conjunction with the union. The employment contract is effective without the term being implied. Consultation via the union should be protective of the individual's interests and minimising the consequences of being made surplus as required by the intent clause of part 10. Finally, the term is not so obvious that it goes without saying however desirable it might be from an employee's point of view.

(69) Reference was made to *Murfitt v Centreport Ltd* [1999] 2 ERNZ 955 where it was held that a term requiring consultation with individuals in a redundancy situation could be implied. That case involved a quite different contract. It contained a declaration of intent which included a provision specifically referring to employees having opportunity to make contributions affecting themselves and their work. *Murfitt* is therefore distinguished.

(70) I conclude that AIT did not consult individually with Ms Stevenson about the selection criteria or their application. There was evidence and argument about whether AIT's consultation with ASTE about selection criteria could be regarded as a substitute for consultation with Ms Stevenson. The plaintiff denied that ASTE was authorised to negotiate or concur with redundancy criteria on her behalf and submitted that ASTE did not hold itself out as a representative for that purpose. In the light of the finding on this issue it is not necessary to reach a decision on the extent of ASTE's authority to represent Ms Stevenson in this regard because the defendant was not under a contractual duty to consult with her as an individual about selection criteria.

Issue 3: Was the defendant under a contractual obligation to the plaintiff to provide the plaintiff, once identified as an individual who might be affected by an identified surplus staffing situation, with advice as to the selection criteria or with an opportunity to be heard on about them?

(71) I regard this issue as being closely linked with Issue 1 and find that it is related more to the obligation of an employer to act fairly than to any express duty or obligation. Whilst AIT was under no express contractual duty to disclose or discuss the selection criteria with Ms Stevenson, when it chose to refer to them in the 24 June memo it should have done so in a fair and reasonable way. The reason for this is that the 24 June memo purported to be

in compliance with the obligation under clause 10.3.1 to advise individuals. That means that the criteria which were applied should have been set out in full and preferably with the weighting which was to be applied to each one. The generality and inaccuracy of the wording of the actual criteria in the memo made it misleading and therefore unfair. I make this finding mindful of the defendant's submission that the selection criteria had been discussed at various stages with ASTE. Even if it can be taken that because of this Ms Stevenson should or ought to have known of the specific criteria the fact is that there were significant changes to the criteria following ASTE's meeting with the review team about which Ms Stevenson could not possibly have known without advice from AIT.

(72) In the interest of minimising the serious consequences of the loss of employment by individual employees the advice which the employer is contractually obliged to give should be accurate so that an employee is not left, as happened in this case, under an illusion that they are unlikely to be affected by the surplus staffing situation.

(73) Mr Harrison argued that the contract imposed a duty on the employer to give the individual an opportunity to be heard about the selection criteria. There is certainly no express duty and for reasons expressed earlier about implication of terms, no term can properly be implied. The fact that ASTE's assistance is referred to indicates that it is more likely that any concern the individual has about the selection criteria are to be conveyed through the union. Under clause 10.3.1 if Ms Stevenson had properly been advised of the selection criteria she would have been able, through the union, to express her concerns. It must be noted, however, that any right to be consulted in this way does not obligate the employer to act on these submissions.

Issue 4: Was the defendant under a contractual obligation to the plaintiff to consider and exhaust the options prescribed by clause 10.4(i) – (iv) of the contract before identifying surplus staffing situations, and if so should the plaintiff have had the opportunity to be heard in relation to these options?

(74) The clause 10.4 options to be applied in staff surplus situations are:

1. Attrition.
2. Redeployment.
3. Enhanced early retirement.
4. Retraining.
5. Severance.

(75) This clause follows 10.3 which deals with consultation and notification. In spite of this order, Mr Harrison submits that the employer's duty is to apply 10.4 *after* a surplus staffing situation has been confirmed but *before* individual staff are made redundant. The rationale for this is that alternatives to involuntary severance could be explored by a much wider

group of employees thereby possibly reducing the number of persons who would need to be made involuntarily redundant. Mr Harrison referred to Ms Henry's evidence and submitted that at the very least the possibility of some employees from within the management discipline taking voluntary severance could have been fully explored with a reasonable likelihood that some would have taken up the option. Mr Harrison's submission is that if clause 10.4 was not interpreted in this way then the application of the options is a meaningless exercise with those selected for redundancy simply being offered the option of resigning to save face rather than being made redundant. He submits that the true intent of 10.4 to minimise the use of severance would not be achieved in this way.

(76) Ms Beck said the placement of the options clause in the contract was entirely deliberate and they are chronologically subsequent to 10.3. She submits that the options are to be applied only once particular surplus positions had been identified.

(77) The placement of 10.4 in the contract is less than helpful and if Mr Harrison's contended interpretation is correct it would have been more appropriate to have had it placed before 10.3. I agree with Mr Harrison that given that the aim of the options is to minimise the use of severance and that severance is the last in the list of options to be applied then consideration of the options should precede the options to identify specific positions as surplus. An example of clause 10.4 operating in that way occurred in this case. Although the review identified that there was a surplus staffing situation in the accounting group, attrition meant that it was not necessary for specific positions to be identified.

(78) Notwithstanding that finding, the plaintiff faces a significant evidentiary hurdle in persuading the Court that actions other than severance should have been adopted in the case of the management and employment relations group. The evidence from AIT witnesses about this was uncompromising. Voluntary severance was considered specifically in the case of one person who had asked for enhanced early retirement and specifically rejected by AIT. I am satisfied that the reason for rejecting the use of the options in the case of the management and employment relations group were made in good faith and rationally and without any desire to dispense with any particular individuals. AIT had specific needs it had to address in its restructuring and were entitled, having given consideration to the use of the options, to reject them in order to achieve those specific objectives.

Issues 5 & 6: Did the criteria ultimately applied by the defendant to the plaintiff breach either clause 10 of the contract or the implied term because of relevance, unfairness, lack of objective measurable standards applied, last minute changes to the selection criteria applied. And did the defendant with applying the selection criteria fail to apply them fairly and in good faith and in breach of either clause 10 of the contract or the implied term in relation to the plaintiff?

(79) Under this heading the plaintiff's case is firstly that the contents of the final criteria were unfair and unreasonable, and secondly that the way in which the final criteria were applied was in breach of the implied term of fair and reasonable treatment.

(80) Although Mr Harrison urged the Court to consider looking behind the selection criteria to assess if they were capable of meeting AIT's need to retain staff in the management and employment relations disciplines I am not prepared to do that. *Dunn v Methanex NZ Ltd* [1996] 2 ERNZ 222 sets out the rationale by which the Court can evaluate an assessment of an individual employee selected for redundancy. There is no doubt that an employer, acting in good faith, motivated by reason and relying on material with correct motives is entitled to his or her decision. The Court can only interfere with the employer's right to assess its staff if the criteria were unfair, unreasonable, or irrelevant to the state of purpose. On the evidence I cannot reach this conclusion. On any assessment AIT's general requirement for teaching experience, qualifications, etc cannot be criticised. However, as already discussed, the way in which the criteria were applied is more problematic.

(81) The plaintiff says that there is a significant difference between what witnesses for AIT have claimed to be the final criteria and the application of those as described by Mr McCormack. I accept that the final criteria of 25 June were expanded and improvised during the selection process as described by Mr McCormack. The question is whether these variations were sufficient to undermine the fairness of the process or whether, as submitted by Ms Beck, they were so minor as not to change the underlying criteria. The main aspect of this is the use of personal undocumented knowledge about the staff which meant that the selection process ceased to be one dependant on objectively verifiable written records and came to depend, at least in part, on personal recollection. I am satisfied that this was not done with any intention of bad faith. Mr McCormack referred to it as a process of people applying expert or professional knowledge other than the written records. But the fact is that it was done in this way without notice to the affected individuals or indeed to the union. This inevitably creates an impression of subjectivity and personal whim to those who were affected. This is compounded by the way in which the selection panel interpreted the criteria.

(82) Mr Harrison described the criteria which were ultimately applied as "quite staggering in their irrationality." As an example, Mr McCormack was asked if the criteria of teaching to

level 7 was modified during the selection process. He was uncertain if it was modified or just applied in a particular. But I find that the criteria of "teaching at level 7" was both different in substance and applied differently than advised to ASTE. In the response to ASTE's questions AIT said that the criterion was "teaching experience to level 7 for which there are scheduled classes." However in applying the criteria Mr McCormack said this was changed "as a matter of fairness" to include the words "or in similar courses." This meant that somebody like Mr Pasley, who had no experience in teaching at level 7 at AIT, received maximum points for teaching a level 7 equivalent course overseas. In the case of Mr Pasley a difficulty arose when the review team tried to apply the notified criteria. They decided that they had to extend it as a matter of reasonableness and fairness to cover people who had overseas teaching experience. This raises the question as to why this flexible approach applied to one person should not have been applied to others.

(83) Mr McCormack also said that although some issues did require an "interpretative resolution" these were few and did not agree that there had been any change to the teaching qualification criterion which remained the same throughout. He accepted there were some slight changes to the post graduate degree and research qualification criteria. He also agreed there might have been some sloppiness in the way that these were described. For example, the memo of 1 July said that one criterion was post graduate degree in the subject taught when the criteria applied did not require "in the subject taught." Added to this is the fact that points for the post graduate degree were given not only for a completed degree but also for those who had made significant progress towards a post graduate degree. This was at the suggestion of ASTE but this change to the criteria was not advised to the affected individuals before the selection process began.

(84) In summary I find that:

1. The criteria applied were relevant.
2. The criteria were objectively measurable. The plaintiff's criticism of the use of personal knowledge by Mr McCormack and Mr Graydon is understandable but is not sustained after all the evidence is considered. I accept that they were applying professional information they had as a result of their duties rather than subjective impressions.
3. The last minute changes to the selection criteria did result in unfairness. The individuals affected were not willing participants in the selection process and their livelihoods and professional careers were at stake. They had been given an expectation that they would be judged on particular criteria which had been notified to them and these criteria were altered at the time of application. It is of concern that in one instance the teaching experience criterion was altered to give marks to one

particular individual, Mr Pasley. Again, while there is no doubt that the selection panel were acting in good faith, the result of changing the ambit of particular criteria is that the predictability of the outcome was compromised. The result is that the application of the selection criteria was not fair.

Issue 7: Did the defendant fail to follow fair procedure in relation to the selection of the plaintiff for severance on the grounds of redundancy, in breach of the plaintiff's employment contract?

(85) This question can be shortly answered. Mr McCormack said he was so surprised that Ms Stevenson wasn't amongst those who were to stay, that he asked for the allocation of points to be done again and be justified to him. At the end of the day he said that "that is the way the points came out and I would stand by the validity of the criteria that we chose at that time. They needed to be objective, clear cut, yes no and in the vast majority of cases that's what they are." He said that in spite of the lack of points which Ms Stevenson received she was a very good staff member with a huge amount of ability and potential and therefore gave her a very good reference.

(86) Apart from the matters already discussed, namely the variation in the selection criteria applied, there were no other breaches of fair procedure in relation to the selection of the plaintiff's severance on the grounds of redundancy.

Issue 8: Did the plaintiff suffer a loss of remuneration as a consequence of the breach of her employment contract and if so what is the quantum?

(87) The principles for deciding a question such as this were discussed in *Rongotai College Board of Trustees v Castle* [1998] 2 ERNZ 430. In order for a plaintiff to establish that he or she is entitled to lost remuneration because of a failure of procedure, it is necessary for that plaintiff to establish on the balance of probabilities that had he or she been consulted the position would not have been disestablished.

(88) It is extremely difficult to predict what the outcome would have been had the defendant given sufficient notice to Ms Stevenson under clause 10.3.1 to properly alert her to the jeopardy she was facing. There is only a small possibility that she could have taken any steps or put forward any argument which would have altered the outcome of the selection process. As it was she obtained full points for her postgraduate degree and research. She is unlikely to have received any points for teaching qualifications because she had neither formal qualifications nor was she a senior lecturer and as unfair as that may appear to Ms Stevenson those were the only attributes which attracted points. Similarly, in relation to her teaching experience, she was not a person who had taught at level 7 and therefore it is difficult to see what steps she could have taken to persuade AIT that she should have received the points. At best for Ms Stevenson there is a possibility that if Mr

Pasley had not been given points for his teaching experience she could have been closer to the cut off point.

(89) This only a possibility however and the plaintiff has failed to satisfy the Court on the balance of probabilities that the breaches of contract would have led to loss of remuneration. Unfortunately for her Ms Stevenson's job loss was almost inevitable.

Issue 9: Is the notification imposed on the defendant by clause 10.3.2 of the contract satisfied by the giving of advice to an affected employee not less than 2 months prior to the actual date of termination of her employment? This is proposed as an alternative claim.

(90) As the plaintiff has failed to make out her claim for loss of remuneration it is necessary to consider whether she should have received 2 months advice before being given 2 months written notice of termination. The relevant contractual clauses are:

Clause 3.3.1 Notice of Resignation/Termination of Employment
 (a) *Tenured employment may be terminated with two months' written notice by either party.*

and

Clause 10.3.2 Notification
When, as a result of the processes above, specific positions are identified as surplus the Employer will advise the General Secretary of ASTE, the chairperson of the local ASTE branch and the Employees affected not less than two months prior to the date by which the surplus staff are to be discharged. The date may be varied by agreement between the parties.

(91) The case for the defendant is that in a redundancy situation the general notice under clause 3.3.1 must be subordinate to the specific notice provision of clause 10.3.2. Ms Beck submitted that the employment is terminated only once and so notice of termination should only be required once. The plaintiff says that the notification requirement under clause 10.3.2 is 2 months advance warning to "the Employees affected" in addition to the prescribed contractual matters of termination under clause 3.3.1(a). Mr Harrison says that the purpose of the two months notification under clause 10.3.2 is to give the union and the employees affected advance warning of the redundancy selection.

(92) It comes down to what the words "the date by which the surplus staff are to be discharged" means. Ms Beck argues that the dictionary meaning of "discharge" includes dismissal from office or employment (the New Shorter Oxford English Dictionary, Oxford University Press 1973, 1993). She says that this is synonymous with termination. Mr Harrison says that "discharged" should be interpreted as meaning "subjected to the notice of termination procedure under clause 3.3.1(a) of the contract."

(93) The defendant's interpretation is most consistent with the other clauses of Part 10. I take the reference to "discharge" to refer to actual termination of the employment. The

notice period in Clause 10.3.1 is a general provision. If clause 10.3.2 were intended to be additional to that this would have been a significant enhancement of the employees' entitlement which should have been clearly expressed. In the absence of an express provision I hold that the period of notice required to be given by AIT was not less than 2 months under Clause 10.3.2 before the employment was terminated. There is no additional entitlement under Clause 3.3.1(a) and therefore the plaintiff is not entitled to any further awards under this heading

Remedies

Compensation for damage to reputation and overall employability as a tertiary teacher of commerce.

(94) Following *Malik v BCCISA (in liquidation)* [1997] 3 All ER 1 it has been possible for the Court to make a separate award of general damages for loss of reputation or damage to career arising out of the manner and circumstances of a wrongful dismissal. The question is whether or not there is sufficient evidence to support such an award which Mr Harrison submits should be substantial whilst avoiding any doubling up under other heads of damages.

(95) Ms Stevenson believes that because it was known publicly that staff selected for redundancy had been measured against objective skills based criteria then her skills as a tertiary teacher were publicly demeaned. She also believes that she lost her academic reputation because of the assessment process. This evidence was supported by Ms Henry who said that as a potential employer her assumption would be that a person who had been selected for redundancy may have some professional or personal weakness and would generally review that applicant less favourably. This evidence was compromised to a certain extent by Ms Henry's admission that during her 11 years of experience in the area she had not had an application for a position from an academic who had been made redundant.

(96) Ms Beck drew a distinction between people who had been made redundant on the basis of their skills and those who had been selected because of their performance. The evidence is that Ms Stevenson's performance was highly thought of and this was reflected in the reference which she was given when she left. It is not possible to say with any degree of certainty that Ms Stevenson's reputation was damaged as a result of being made redundant. She did have trouble obtaining work outside academia but this does not amount to evidence of her employability as a tertiary teacher of commerce. There will be no award for damages under this heading.

Damages for embarrassment, humiliation, anxiety or distress

(97) Evidence about this has already been set out. There is no doubt that Ms Stevenson was deeply shocked by being made redundant and that this shock was intensified by the failings of AIT to individually advise her of the fact that she was likely to be affected by the review.

(98) The lack of information on how she had been selected offended against her general sense of fairness particularly given her professional knowledge and understanding of proper management techniques. The degree of her upset and grief was supported by Mrs Norton and Mr Webb. Mr Harrison submits that the effects on Ms Stevenson were sufficient to justify an award at the higher end of the scale. AIT does not dispute that Ms Stevenson was initially shocked and then suffered long term effects including headaches, loss of appetite, and sleeplessness but says that this state of health is not necessarily caused by any action of AIT noting that Ms Stevenson had been under considerable stress as a result of unrelated personal matters.

(99) Ms Stevenson's ability to pick herself up after the devastating experience of being made redundant is commendable. In spite of her obvious disgust of having to go through workshops and the like provided by AIT she nevertheless did that and took the opportunity to commence further education. In spite of this her anger and sense of injustice remained strong and was certainly very evident in the course of the hearing.

(100) AIT caused damage to her in the way it chose to conduct itself towards the individuals who were likely to be affected before the selection process was completed. By not properly advising her as an individual under clause 10.3.1 AIT induced in the plaintiff an unjustified feeling of security which made the shock, humiliation, and distress of finding out that she was redundant considerably more than if she had properly been prepared for that experience.

(101) The Court acknowledges that redundancy, however well managed, will always cause distress. However, had AIT complied strictly with the contract by advising Ms Stevenson directly that she was likely to be affected the impact of this blow could have been lessened. An award of compensation is therefore justified to compensate her for the harm caused as the result of the breach of Clause 10.3.1 of the contract by AIT. This does not include the loss of her job. I do not agree that an award near the top of the scale is justified in the circumstances. The defendant is ordered to pay the sum of \$7,500 to Ms Stevenson in distress damages. She is entitled to interest on that at the rate specified in the Judicature Act 1908 from the date of dismissal.

(102) The plaintiff seeks costs. These are reserved. If the parties have not been able to resolve costs between themselves at the end of 21 days of receipt of this judgment the plaintiff is to file a memorandum as to costs and the defendant is to respond to that within 14 days.

A handwritten signature in black ink, appearing to read "Coral Rhaw". The signature is written in a cursive, flowing style.

JUDGE