

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2014] NZERA Auckland 455  
5463582

BETWEEN VICE-CHANCELLOR,  
UNIVERSITY OF  
AUCKLAND  
Applicant

A N D TERTIARY EDUCATION  
UNION  
Respondent

Member of Authority: Rachel Larmer

Representatives: Philippa Muir, Counsel for the Applicant  
Peter Cranney, Counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 22 August 2014 from the Applicant  
26 September 2014 from the Respondent  
01 October 2014 from Applicant

Date of Determination: 07 November 2014

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**DETERMINATION OF THE AUTHORITY**

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- A. Once the participatory review process in clause 2.6 of the Academic Staff Collective Employment Agreement has ended the Vice-Chancellor may amend the policies referred to in that clause without the Tertiary Education Union's agreement.**
- B. Costs are to lie where they fall.**

**Employment relationship problem**

[1] The Vice-Chancellor, University of Auckland (the Vice-Chancellor) and the Tertiary Education Union (the Union) are parties to the Academic Staff Collective Employment Agreement 20 December 2013 – 30 June 2015 (the CEA).

[2] The parties are in dispute over whether clause 2.6 and clause 3, Schedule 2 of the CEA allow the Vice-Chancellor to amend the Academic Grades – Standards and Criteria Policy dated June 2007 (the AGSC Policy) without the Union’s agreement.

[3] The relevant provisions in the CEA are as follows:

2.4 *The employer recognises that employees covered by this agreement are entitled to participate in the academic governance of the University as provided in this clause, both individually and collectively as members of the Union, acknowledging that the University is governed by the Council.*

2.5 *The employer recognises that such collective participation is particular important in relation to academic matters, complimentary to the role and responsibility of the Senate for academic matters.*

2.6 *In order to ensure that such collective participation in the Academic Governance of the University is effective, the employer shall comply with the following participatory processes when reviewing University policies relating to research and study leave, outside activities undertaken by academic staff, and academic grades, standards and criteria:*

(a) *The employer shall inform the Union of its intention to review such policies and entering into discussions regarding the appropriate conduct of the review.*

(b) *The Union shall appoint representative members to participate in the review on behalf of Union members and have the right to seek timely advice from the Union members they are representing during the course of the review.*

(c) *Such representatives shall participate collegially and cooperatively in the review.*

[...]

2.8 *The employee shall, during the continuance of the employment, comply with all the University’s statutes, guidelines and policies, which may be amended by the employer from time to time either in accordance with provisions 2.4 to 2.6 above, or in other cases, following appropriate consultation with and on reasonable notice to the Union and employees.*

[4] Clause 3, Schedule 2 states:

3. *Appointments to, and advancement within and between, academic grades shall be in accordance with the “Academic Grades – Standards and Criteria” HR Policy dated June 2007, which may be amended from time to time by the*

*employer according to the terms of participation in clause 2.6. and according to the following principles: [...].*

[5] Clause 2 recognises that academic employees have a unique role to play in respect of academic governance matters which entitles them to participate in the academic governance of the University. It also refers to two distinct sets of policies; those policies relating to the matters specified in clause 2.6<sup>1</sup> and the other policies referred to in clause 2.8.

[6] Clause 2.6 sets out the mandatory participatory review process to be followed if the University wishes to review any of the policies identified in that clause. The Vice-Chancellor is required to inform the Union of the intention to review these specified policies before a review is commenced. Once the review is announced clauses 2.6(a)-(c) are activated, in terms of the procedure which is to be followed for the review.

[7] Clause 2.8 recognises that the Vice-Chancellor may amend University policies. Amendments to the policies specified in clause 2.6 may be made in accordance with the requirements of clauses 2.4-2.6 (i.e. the participatory review process applies to these policies) or amendments to other policies may occur after consultation and notice requirements have been complied with.

[8] Clause 3, Schedule 2 relates to the AGSC Policy and the employer's discretion to amend it.

[9] The Vice-Chancellor says these provisions give him the discretion to amend the AGSC Policy after the mandatory participatory review process (as required by clause 2.6) has been completed. The Union says the AGSC Policy cannot be amended without its agreement.

## **Issue**

[10] This determination does not deal with whether or not the requirements of clause 2.6 have been complied with in respect of the proposed amendments to AGSC Policy. I merely note that the Vice-Chancellor believes they have whilst the Union appears to dispute that.

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<sup>1</sup> Research and study leave; outside activities undertaken by academic staff, and academic grades, standards and criteria.

[11] The sole matter at issue is determining whether the AGSC Policy can be amended without the Union's agreement after the participatory review process in clause 2.6 has ended without agreement having been reached.

### **Relevant law**

[12] The leading authority on contract interpretation is the Supreme Court decision in *Vector Gas Limited v. Bay of Plenty Energy Limited*<sup>2</sup>. Although *Vector* involved interpretation of a commercial contract the Court of Appeal in *Silver Fern Farms Limited v. New Zealand Meat Workers and Related Trade Unions Inc.*<sup>3</sup> recognised the same principles apply to the interpretation of employment agreements.

[13] The Authority is required to adopt a principled approach to the interpretation of employment agreements and the meaning of a disputed clause is to be determined objectively. This requires the Authority to inquire into what a reasonable and properly informed third party would consider the parties intended the words of the contract to mean.

[14] The Supreme Court in *Vector* held that extrinsic material could be used to clarify the meaning of a disputed clause whether or not it was ambiguous in case the plain and unambiguous meaning did not properly reflect what a reasonable person with awareness of the circumstances surrounding the contractual arrangements would consider the parties intended their words to mean.

[15] The Authority's task is to determine the meaning of the disputed clauses that a reasonable person with knowledge of the background to the CEA would give to it, so the factual matrix may be admissible as an aid to interpretation, but subjective evidence about what the parties individually intended, or what their negotiating stance was is not relevant. I therefore put all such subjective evidence which has been provided by the parties to one side and confirm it plays no part in this determination.

[16] The Employment Court in *New Zealand Amalgamated Engineering, Printing and Manufacturing Union v. Amcor Packaging (New Zealand) Limited*<sup>4</sup> recognises that context must be considered so that commercial substance and purpose is emphasised over semantics and syntactical analysis of words.

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<sup>2</sup> [2010] NZSC 5

<sup>3</sup> [2010] NZCA 317

<sup>4</sup> [2011] NZ EmpC 135

[17] The Court of Appeal in *Pyne Gould Guinness Limited v. Montgomerie Watson (NZ) Limited*<sup>5</sup> recognised that consideration of the surrounding contractual circumstances could be used to cross check that the correctness of the natural interpretation of words was appropriate.

[18] The Employment Court in *New Zealand Meat Workers and Related Trades Union Inc. v. AFFCO New Zealand Limited*<sup>6</sup> undertook such a cross check by considering extrinsic evidence despite finding the disputed clause was not ambiguous, that there was no issue of estoppel or special meaning involved. It did so to ensure that the plain and unambiguous meaning of the material clause had not been modified by the particular context which applied to the contractual arrangement between the parties.

### **Is the Union's agreement required before the AGSC Policy can be amended?**

[19] The Union acknowledges that the policies referred to in clause 2.6 may be amended "*in accordance with the provisions 2.4 to 2.6*" of the CEA. The Union says there is no additional employer right to amend policies other than in accordance with those requirements.

[20] The Union accepts clauses 2.4 – 2.6 of the CEA do not require the parties to reach agreement. It also concedes that none of the participants in the participatory review process (including the Vice-Chancellor) has any obligation to agree on any of the matters which are the subject of the clause 2.6 participatory review.

[21] The Union say that if there is no agreement or consensus or other result reached at the conclusion of the clause 2.6 participatory review process then the review comes to an end and matters must continue unchanged (i.e. the policies under review may not be changed).

[22] The Union says that if no agreement is reached then it is open to the Vice-Chancellor to either initiate another review at a later date or to seek to resolve the matters over which agreement has not been reached via the collective bargaining process. The Union claims the Vice-Chancellor does not have a right to unilaterally amend the policies set out in clause 2.6 following the end of the participatory review process.

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<sup>5</sup> [2001] NZAR 789(CA).

<sup>6</sup> [2011] NZEmpC 144.

[23] The Union submits that a unilateral amendment to the policies identified in clause 2.6 by the Vice-Chancellor after the participation process set out in clause 2.6 ends is not *in accordance with the terms of participation* (as required by clause 2.8) but is a separate exercise post-dating the participatory review process.

[24] The Union claims that the only way in which the policies identified in clause 2.6 can be amended while the CEA is in force is by the collegial, cooperative and participatory review process set out in clause 2.6.

[25] The Union submits that the Vice-Chancellor has no unilateral right to continue a review of the specified policies after the participatory review process in clause 2.6 has ended. The Union says that any amendment by the Vice-Chancellor of the AGSC Policy is in fact another “*review*”, which cannot occur outside the review process specified in clause 2.6 of the CEA.

[26] The Union say that once the participatory review process is over that is the end of the matter and the Vice-Chancellor has no entitlement under the CEA to initiate his own unilateral review, or to recommence or continue the completed review without complying again with clause 2.6(a)-(c).

[27] The Union acknowledges that all that the representative members are required to do in terms of the clause 2.6 participatory review is to participate collegially and cooperatively in the review.

[28] The Union say that the participatory review required by clause 2.6 of the CEA is different to the consultation which occurs in an ordinary business context. The Union says it is participation in academic governance, not a right to be consulted prior to an exercise of management prerogative, which is addressed by clause 2.6.

[29] I find that the plain and unambiguous wording of clause 2.6 and clause 3 of Schedule 2 is that the Union’s agreement is not required before amendments can be made to the AGSC Policy.

[30] It is significant that the word “*agreement*” is not used in either of these clauses. It is also significant that clause 3, Schedule 2 expressly provides that “*the employer*” may amend the policies – it does not say that amendments must be made by “*the parties.*”

[31] A reasonable and properly informed person would consider that if agreement is not expressly stated then agreement is not required. In other words a reasonable person would consider that the parties would have expressly referred to the requirement for agreement to have been reached if agreement was needed before the AGSC Policy could be changed. That omission must therefore be significant.

[32] An objective third person would also conclude that the express reference to the ability of ‘*the employer*’ to amend policies reserves that right to the employer, not to the employer and Union acting together, which is the effect that requiring the Union’s agreement to any amendments would have.

[33] I find that the Union’s interpretation limits and restricts the employer’s right to amend its policies in ways that are not reflected in the wording used in the CEA.

[34] Clause 2.8 recognises two different categories of policies which “*may be amended by the employer from time to time*”;

- (i) those relating to research and study leave, outside activities undertaken by academic staff, and academic grades, standards and criteria; and
- (ii) other policies.

[35] The first category above requires amendments to be made “*in accordance with provisions 2.4-2.6*” whilst the second category allows amendments to other policies to be made “*following appropriate consultation with and on reasonable notice to the union and employees.*”

[36] Clauses 2.4-2.6 do not require agreement to be reached. Rather these clauses establish a mechanism by which employees can participate in the academic governance of the University by allowing them to engage in a participatory review process when the University decides it want to review certain specified policies.

[37] I do not accept the Union’s submission that the words “*in accordance with*” in clause 2.8 and “*according to*” in clause 3, Schedule 2 means “*in a manner conforming with.*” No explanation for this interpretation was provided, nor was any supporting case law referred to in support of the Union’s submitted definition.

[38] I prefer Ms Muir’s submission that the words “*in accordance with*” means “*in agreement with or in compliance with*” as held by the Employment Court in *Van*

*Branden Burg v. Queenstown Lakes District Council*<sup>7</sup> which was a finding that was not disturbed on appeal to the High Court.

[39] It follows that as long as the Vice-Chancellor has complied with the participatory process in clause 2.6(a) to (c) when reviewing the AGSC Policy, then as stated in clause 3, Schedule 2 and clause 2.8 of the CEA the AGSC Policy “*may be amended by the employer.*”

[40] I find that clause 2.6 requires:

- The employer to inform the Union of its intention to review the policies;
- The parties to discuss the appropriate conduct of the review;
- The Union to appoint representative members to participate in the review;
- The Union representatives have the right to seek timely advice from the members they are representing; and
- Representatives are to participate collegially and cooperatively in the review.

[41] I accept Ms Muir’s submissions that under clause 2.6 it is the *employer* who will *review* the policy (and invite the Union to participate in the review) and it is the *employer* who has the right to *amend* the policy from time to time in accordance with clause 2.6.

[42] The clause 2.6 participation process does not contain a right of veto by the Union. The CEA fails to state that amendments cannot be made unless agreement is reached. The strong implication from that omission is that once the participation process in clause 2.6 has ended the Vice-Chancellor is free to amend the policy or policies that were the subject of review. If that was not the case I would expect the parties to have made that clear.

[43] Nor do I accept that the Vice-Chancellor amending a policy which has been through a participatory review in accordance with clause 2.6 but in respect of which

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<sup>7</sup> CO85/07, 28 June 2007 at [71]

agreement has not been reached amounts to a further “*review*”. I consider that “*review*” is different from amend. According to the Oxford English Dictionary review is defined as “*a general survey or assessment of a subject or thing, a revision or reconsideration, to reconsider or revise, to view again.*”

[44] Clause 2.6 provides a mandatory process whereby Union representatives can be involved with the employer in surveying or assessing policies which the University may wish to change. This review is a precursor to any changes or amendments being made. Once the review of the AGSC Policy has occurred in accordance with the requirements of clause 2.6 then I consider clause 3, Schedule 2 of the CEA allows the Policy to be amended.

[45] By way of a cross check of my findings relating to the plain and unambiguous wording of the material clauses I have regard to the changes between the previous and current CEA which I consider support my interpretation.

[46] The previous 01 July 2009 – 30 June 2010 CEA between the parties expressly dealt with changes to the AGSC Policy in clause 3, Schedule 2 which states:

**3.0: *Promotion criteria***

*The standards and criteria to be used by the University in considering applications for the following grades are contained in the “Academic Grades – Standards and Criteria ‘policy dated 1.12.01’ or such subsequent policy as may be agreed by TEU (‘Criteria Policy’).” (emphasis added)*

[47] This establishes that amendments to the AGSC Policy had to be agreed by the Union. The requirement for amendments to be agreed with the Union does not appear in the current CEA which was ratified after extended bargaining and a facilitation hearing in early November 2011.

[48] This analysis indicates that a fundamental change was made in so far as contractual requirements relating to policy amendments were concerned. The removal of the requirement for agreement from the current CEA strongly suggests agreement is no longer required. I consider it is inappropriate to imply into clause 2.6 a restriction on the employer’s ability to amend its policies which has not been stated particularly when the previous CEA expressly did so.

[49] The removal of the requirement for the Union to agree to changes to the AGSC Policy must be viewed as a significant change. It is material that the current CEA removes the requirement for agreement from clause 3, Schedule 2 and has replaced it with new wording in clause 3, Schedule 2 which refers to the new participatory review process in clause 2.6. A reasonable person would therefore expect from these circumstances that agreement is no longer required.

[50] The previous need for the Union's agreement has been replaced by the participatory review process in clause 2.6 which the Union acknowledges does not require agreement. This fundamental change accords with the plain and unambiguous meaning of the words used in the current CEA.

[51] I therefore find that the extrinsic information, as viewed by an objective but properly informed third party, does not contradict the plain and unambiguous meaning of the words used. I consider it clear that the current CEA has removed the requirement for the Union to agree to policy changes.

[52] I do not accept the Union's suggestion that it has a *right of veto* in respect of proposed changes.

[53] I consider that the plain and unambiguous wording is that the Union's agreement is not required to changes to the University's policies. Amendments may be made by the Vice-Chancellor to the specified policies in clause 2.6 provided that each of the matters identified in clause 2.6(a) to (c) have been complied with.

[54] I consider that a reasonable person aware of the relevant circumstances would consider that the Vice-Chancellor has the discretion to make a final decision regarding policy amendments after the participatory review process with the Union representatives has ended.

### **Outcome**

[55] I find that the Vice-Chancellor does not require the Union's consent or agreement to amendments to the AGSC Policy provided the participatory review process required by clause 2.6 of the CEA has been complied with. At the completion of that process the Vice-Chancellor may choose to amend the AGSC Policy.

[56] Likewise the Vice-Chancellor may amend the policies referred to in clause 2.6 at the conclusion of the participatory review process provided the requirements of clause 2.6 have been met.

[57] I consider that the Vice-Chancellor's discretion to "*amend*" policies includes deleting or replacing or amalgamating them.

### **Costs**

[58] I consider that costs should lie where they fall because this matter involved a genuine dispute about interpretation of a new clause in the current CEA.

**Rachel Larmer**  
**Member of the Employment Relations Authority**