IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2024] NZEmpC 226
EMPC 442/2023

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	GLENFIELD COLLEGE BOARD OF TRUSTEES First Plaintiff
AND	NZEI TE RIU ROA Second Plaintiff
AND	SECRETARY FOR EDUCATION Third Plaintiff
AND	FIONA ANDERSON Defendant

Hearing:	15-17 July 2024
Appearances:	P J Pa'u and P M Pa'u, advocates for first plaintiff P Cranney, counsel for second plaintiff C R Cartwright and A L Russell, counsel for third plaintiff G Pollak, counsel for defendant
Judgment:	22 November 2024

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

Introduction

[1] The proceedings involve a de novo challenge to a determination of the Employment Relations Authority.[1] The Authority found that Mrs Anderson had been

[1] *Anderson v Glenfield College Board of Trustees* [2023] NZERA 654 (Member Urlich).

unjustifiably constructively dismissed from her employment at Glenfield College following a unilateral reduction in her hours of work. It ordered the Board of Trustees of Glenfield College (the Board) to pay Mrs Anderson lost wages, wage arrears and compensation, totalling almost $80,000.

[2] The Board challenges the Authority's determination. In essence it says that it was entitled to reduce Mrs Anderson's hours under a provision in the relevant collective employment agreement (CEA), which applied via her individual employment agreement (IEA).

[3] The Secretary for Education and NZEI are parties to the collective agreement. They were joined as plaintiffs to the challenge.[2]

[4] Mr Pollak, counsel for Mrs Anderson, opened the case by making the sobering observation that the grievance has been before the employment institutions (the Authority and the Court) for longer than the first World War. The delays were in large part caused by the fact that two full investigations had to be undertaken by the Authority, through no fault of either party. Regrettably one of the key witnesses for the plaintiff passed away prior to this hearing. His brief of evidence, filed in the Authority in both investigations, was admitted by consent.[3]

[5] This is a de novo challenge and the Court must reach its own decision after hearing the claim afresh. I have however reached the same overall conclusions as those reached by Member Urlich in her comprehensive determination, for reasons which will become apparent.

Background facts

[6] Mrs Anderson received an offer of employment from the then Principal of Glenfield College, Mr McKinley, on 12 September 2018. The offer was to the position of Director of International Students, commencing on 5 November 2018. The offer recorded Mrs Anderson's annual salary, which would be reviewed at the end of the

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2 *Glenfield College Board of Trustees v Anderson (No 2)* [2024] NZEmpC 80.
3 *Glenfield College Board of Trustees v Anderson (No 3)* [2024] NZEmpC 92.

first term of 2019, and that her hours would be full-time (37.5 hours per week), 52 weeks per year.

[7] The offer document went on to note that "[a]ny variation to the terms and conditions of [Mrs Anderson's] employment will be advised in accordance with the relevant provisions of the Support Staff Collective Agreement 2017-2019" (CEA 2017-2019) and that the work to be undertaken by Mrs Anderson was covered by that agreement. A link to the CEA on the Ministry of Education website was included in the offer document.

[8] Mrs Anderson signed an IEA on 13 September 2018, which was counter-signed by Mr McKinley on behalf of the Board of Trustees, on 7 November 2018. The agreement stated that Mrs Anderson's appointment as Director of International Students took effect on 5 November 2018 and that it was "upon and subject to the terms and conditions contained in this agreement." Amongst other things the agreement recorded that:

- "The Employee's hours of work will be full-time, 52 weeks per year which includes annual leave as per the C[E]A."

- "The work to be performed by the Employee is set out in the job description."

- "The terms and conditions of employment under this agreement are the terms and conditions of the Support Staff in Schools' Collective Agreement 2017-2019, with all the necessary modifications applicable to an individual employment agreement for support staff."

[9] The job description was appended to the IEA. Mrs Anderson gave evidence, which I accept, that her role involved all aspects of her job description, including engaging with students, taking them to appointments and other aspects of pastoral care for them.

[10] COVID-19 hit New Zealand in 2020 and led to a number of lockdowns, which impacted negatively on the volume of international students coming into the country to study. This, in turn, impacted on Glenfield College.

[11] On 5 August 2020 Mr McKinley wrote to Mrs Anderson advising her that he was undertaking a review of "staffing in the International Department". He set out what was described as a "preliminary proposal" to reduce her hours of work by up to 20 hours per week in light of his belief that there was not enough work for two full-time staff. He went on to say that he wanted to meet with Mrs Anderson (and any relevant support person) on 13 August 2020 to discuss her response to his proposal. He emphasised that he was prepared to listen to what she had to say with an open mind, including any alternatives she might propose to a reduction in her hours. A final meeting would then occur the next day, on 14 August 2020, to "confirm" his decision. He said that would serve as "notice" pursuant to the CEA and the new hours of work would take effect from 14 September 2020. The meeting and "notice period" were described as an opportunity to discuss the required factors under the CEA.

[12] Mr McKinley's letter stated that the process he was conducting accorded with cl 2.5 of the CEA, and set out in full the provisions he said were relevant. At this point it suffices to note that the clauses Mr McKinley set out, and which he said he would be applying, were clauses from the CEA 2019-2022, not the CEA 2017-2019 that Mrs Anderson's IEA referred to. That reliance was problematic, for reasons I will come to.

[13] One of the clauses Mr McKinley said would apply to Mrs Anderson's situation was cl 2.5.1A. It stated that:

> 2.5.1A From 29 June 2020 subject to clause 2.4.2 and notwithstanding clause 2.5.1 above, for employees who routinely undertake work set out in the Teacher Aide Work Matrix Table in clause 3A.3.3, whether designated as a Teacher Aide or not, the employer's ability to vary the employee's hours of work and / or weeks worked per year will be restricted to a maximum variation of 25% of the hours and / or weeks the employee is currently employed to work in any 12 month period. For any variation in excess of 25%, the provisions of clause 10.2 will apply. The employer and employee may agree to vary the employee's hours of work and / or weeks worked per year over and above the 25%

> maximum. Where this is by agreement clause 10.2 will not apply.

[14] The meeting between Mrs Anderson and Mr McKinley took place on 3 September 2020. Prior to the meeting Mrs Anderson prepared a series of questions that she wanted to ask Mr McKinley. She also prepared a proposed plan for addressing the concerns he had identified and a list of student numbers and comparable data from other schools that she had obtained. Amongst other things she identified the following question:

> … from 2019-2020 there were 2 full time staff in the department and over this period the departments fte's have only dropped 7.75 students but you are looking at the possibility of cutting hours by over 50%, can you please explain how you have made this decision?

[15] Mrs Anderson sent Mr McKinley this material in advance of the meeting and provided it again at the outset of the meeting.

[16] Ms O'Brien, the school's business manager, was also in attendance at the meeting, along with a support person for Mrs Anderson. Notes of the meeting reflect that Mrs Anderson made a significant number of points and asked numerous questions, including what the decision to reduce hours was based on and what Mr McKinley's plan for the International Department was. It appears that he provided answers to some but not all of the questions raised. Mrs Anderson also detailed the tasks that she would still be required to do, despite the downturn in student numbers, to demonstrate that her role could not reasonably be reduced in the way proposed. She prepared two budgets covering two alternative staffing arrangements, that she gave to Mr McKinley. He did not respond to the budgets at the meeting but asked Mrs Anderson to email them to him, which she did. The notes concluded with three agreed action points:

(a) that Mrs Anderson would email her questions to Mr McKinley;

(b) that Mr McKinley would respond to Mrs Anderson by the middle of the following week with answers to her questions; and

(c) that Mrs Anderson would provide Mr McKinley with relevant documents to show the Board of Trustees.

[17] Mrs Anderson duly emailed her questions to Mr McKinley and provided him with the documentation she considered relevant. Mr McKinley did not respond to her questions within the agreed (middle of the following week) timeframe. Rather, on 11 September 2020 Mr McKinley wrote to Mrs Anderson giving notice of a reduction in her hours of work, to take effect from 12 October 2020. The letter advised that:

> I have decided that your hours of work will reduce to 21 hours per week (three days per week …) … I have carefully considered the matters you raised with me in arriving at my decision.
>
> The reduction is in no way a reflection of your performance and commitment to the school. Once the country's borders open for International Students to return, and when our student numbers increase by a reasonable level, I hope that the school will be in a position to increase your hours of work.

[18] Not surprisingly, Mrs Anderson was very upset when she received this letter. She sent an email to Mr McKinley on 14 September 2020 noting that he had still not provided answers to the questions she had raised at the meeting, and requested that he do so.

[19] Mr McKinley responded on 17 September 2020 saying that he was happy to provide a response to the questions she had asked; he assured her that he had carefully considered the matters she had raised before deciding to reduce her hours; and reiterated that her new hours would take effect from 12 October 2020. He concluded his response by advising that he would prepare a draft job description for her review well before the change "as your duties will need to be amended to reflect the reduction in hours of work".

[20] I note at this point that while Mrs Anderson had provided Mr McKinley with the documents she considered relevant, it remained unclear on the evidence if and when Mr McKinley showed them to the Board (the third agreed action point). What does, however, appear from the documentation is that the Board (Mrs Anderson's employer) first discussed the possibility of reducing the hours of the International Department staff as early as March 2020. That came well before Mr McKinley's first conversation with Mrs Anderson proposing a reduction in her hours. The delay in advising Mrs Anderson that her hours were in jeopardy, engaging with her and providing relevant information, was largely unexplained and problematic.

[21] Returning to the chronology, in response to Mr McKinley's 17 September 2020 email, Mrs Anderson requested a copy of the meeting minutes because she said that was "part of the process" given Mr McKinley had called the meeting. She acknowledged Mr McKinley was busy, but also noted that it was a very stressful time for her and reiterated her request for a response to her questions.

[22] On 21 September 2020 Mr McKinley wrote to Mrs Anderson setting out responses to the questions she had raised at the 3 September 2020 meeting.

[23] A meeting to confirm the new job descriptions was scheduled for 23 September 2020. The new job description was markedly similar to Mrs Anderson's existing job description. This, in turn, gave rise to concerns as to how Mrs Anderson was expected to carry out the tasks identified in the job description within significantly less hours.

[24] The 23 September meeting was attended by Ms O'Brien. Ms O'Brien gave evidence that she took notes of the meeting.

[25] The original meeting notes were not before the Court. What was before the Court was a copy of Ms O'Brien's brief of evidence filed in the Authority, which itself purported to set out the notes. Mrs Anderson vehemently disagreed with a number of points made in the notes, and said they were inaccurate in material respects. Ms O'Brien gave evidence that she made notes immediately after the meeting on 23 September 2020 (so not during the meeting, which was lengthy). And it remained unexplained where the original notes were and the process by which they were said to be replicated into her brief of evidence filed in the Authority some three years later. Nor, as Mrs Anderson said, did she have the opportunity to review the notes for accuracy at the time. In the circumstances, and in light of the uncertainty as to accuracy, I do not consider the extract of notes referred to by Ms O'Brien as being of material assistance.

[26] A personal grievance was raised on Mrs Anderson's behalf on 24 September 2020 by Ms Watson, Mrs Anderson's representative at that time. A number of concerns were identified about the contractual provisions the Board had relied on in reducing her hours and the process that had been followed; proposals were put forward

to resolve matters. One of the proposals was that Mrs Anderson would agree to a variation of her IEA from full time (37.5 hours per week) to 0.8 FTE (30 hours per week) and a corresponding reduction in salary, which was said to be proportionate with the 10 to 15 per cent reduction in the duties in her job description, to be reviewed in 2021.

[27] Mrs Anderson also sought an acknowledgment that the Board had not acted in good faith throughout the process and had caused her unnecessary stress. It was also contended that Mrs Anderson's position had been made redundant and that the provisions in the CEA relating to redundancies should apply, and noted that Mrs Anderson "loves her job and wants to keep it". None of the proposals contained in the letter were responded to.

[28] The following day, Mrs Anderson's representative further articulated the basis of the personal grievance as the changing of her terms and conditions of employment in the manner undertaken by the Board. Confirmation was sought that the reduction in hours would not be actioned in the meantime. Mrs Anderson disputed that any agreement had been reached as to reduced working hours. Ms O'Brien responded saying that the change would take effect unless the Board stated otherwise. On 1 October 2020, further information going to the basis of the decision was requested by reference to s 4 of the Employment Relations Act 2000 (the Act) ("Parties to employment relationship to deal with each other in good faith").

[29] No response to the request for information had been received by 12 October 2020, the date the reduced hours were due to come into effect. Mrs Anderson's representative advised Mrs Anderson she would continue working full-time hours under her IEA until agreement on new terms and conditions of employment could be reached or a determination by the Authority.

[30] On 16 October 2020 Mr McKinley wrote to Mrs Anderson. He made it clear that he expected Mrs Anderson, as Director, to play the lead role in ensuring that the core work of the department continued to be undertaken, including meeting the Board's requirements under the Education (Pastoral Care of International Students) Code of Practice 2016. To this end he asked for Mrs Anderson to produce a written

report as to what arrangements had been made to carry out the work and by whom. As Ms Watson observed in cross-examination, this was the sort of inquiry that cl 2.5 of the CEA envisages being made *prior* to decisions being made.

[31] It was around this point in time that communications between the parties deteriorated. Mediation was not pursued and a statement of problem was filed with the Authority. The statement of problem alleged that the proposal to reduce Mrs Anderson's hours by 50 per cent would, if proceeded with, amount to a redundancy and that the Board was acting in a way which was designed to force, or likely to have the effect of forcing, Mrs Anderson to resign (amounting to an unjustified dismissal).[4]

[32] On 21 October 2020 Mr McKinley wrote to the Board Chair raising a complaint against Mrs Anderson in respect of alleged "unprofessional", "undermining" and "deeply concerning" behaviour; and of refusing to comply with lawful and reasonable instructions. He asked that the Board investigate her conduct. The complaint was drawn to the attention of Mrs Anderson, through her representative, on 22 October 2020, and a letter formally commencing the inquiry was sent on 29 October 2020. The letter advised that, depending on the outcome, dismissal with or without notice was a possibility. It appears that Mrs Anderson was on sick leave at the time that letter was sent.

[33] Mrs Anderson was still on sick leave, under a medical certificate, when she received a further email advising that a meeting that week was proposed (upon the expiry of her medical certificate) as the Board Chair was anxious to progress the disciplinary investigation. The email was sent on Sunday 20 December 2020; the meeting was proposed for 11 am Tuesday 22 December. The school was, by this stage, closed. It is salient to observe (as Mrs Anderson did in evidence) that the date came very close to Christmas and that up to this point the Board had advised that it was too busy to attend mediation with her. Mrs Anderson clearly found it upsetting that, while the Board did not have time to mediate with her in an attempt to resolve matters, it

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[4] I note that the initial proposal was a reduction from 37.5 hours to 21 hours, so somewhat less than a 50 per cent reduction.

nevertheless had time to progress a disciplinary investigation into alleged concerns about her behaviour (on matters that were plainly interrelated).

[34] On 21 December 2020 Mrs Anderson advised the Board Chair that she was resigning as she felt she had no other option. She alleged that she had been subject to a campaign to get rid of her; that she had been subject to an unlawful change to her hours and pay; and that the investigation had left her with no option but to resign. She raised a personal grievance for constructive dismissal. The Board accepted her resignation by email dated 30 December 2020, and denied the allegations made against it.

[35] The Board then filed a counterclaim against Mrs Anderson. That claim related to the concerns Mr McKinley had raised with the Board, and breaches of duty Mrs Anderson was said to have committed. The counterclaim was withdrawn before the Authority's first investigation meeting.[5]

What were the applicable terms of Mrs Anderson's employment?

[36] Mrs Anderson was employed under an IEA. The IEA expressly set out the hours of work (full-time, 52 weeks a year) and a per annum salary. The work to be performed under the employment agreement was set out in a job description.

[37] The IEA went on to state that the terms and conditions of employment under it "are those terms and conditions of the Support Staff in Schools' Collective Agreement 2017-2019, with all the necessary modifications applicable to an individual employment agreement for support staff." While the letter of offer (dated 12 September 2018) had noted that "any variation to the terms and conditions of your employment will be advised in accordance with the relevant provisions of the [Collective Agreement]," the IEA did not contain this statement and it was the terms of the IEA that Mrs Anderson signified her agreement to. As I have said, the IEA simply referred to Mrs Anderson's terms and conditions of employment under the IEA

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5 *Anderson v Glenfield College Board of Trustees*, above n 1, at [2]; and *Anderson v Glenfield College Board of Trustees* [2023] NZERA 725 (Member Urlich).

being those set out in the CEA, subject to any necessary modifications. Mrs Anderson signed the IEA on 13 September 2018.

[38] The CEA relevant to Mrs Anderson's employment was the one referred to in the IEA, namely the CEA 2017-2019. There is nothing to suggest that the parties agreed that the terms and conditions of subsequent CEAs would apply to Mrs Anderson.

[39] The CEA 2017-2019 contains the following provisions of particular relevance. Clause 2.1 provides that the Board must operate a personnel policy that complies with the principle of being a good employer. Clause 2.2.3 provides that:

> Every appointee to a vacancy shall be notified in writing of:
> (a) the appointment; and
> (b) the grade, step and pay rate/salary to be paid for the position; and
> (c) the hours and weeks to be worked…

[40] Categories of employment for full-time, part-time and fixed term appointments are set out (at cl 2.3). A full-time employee is defined in cl 2.3.1 as "an employee who is employed for 37.5 or 40 hours per week". A part-time employee is defined as "an employee who is regularly employed for less than the full-time hours as specified in cl 2.3.1". Clause 2.4 is titled "Hours of work and weeks per year" and states that employees' hours and weeks of work per year will be set to meet the requirements of the school, including having regard to time spent on various activities (see cl 2.4.2).

[41] Clause 2.5 provides a mechanism by which the Board may vary an employee's hours or weeks per year of work:[6]

> **2.5 Variation of hours per week and/or weeks per year**
>
> 2.5.1 Except as provided for in clause 2.6, each time the hours of work and the weeks worked per year for employees are fixed by the employer, they shall be fixed by written advice to the employee for a minimum of twelve months. After consideration of clause 2.4.2 the employer shall give the employee not less than one month's written notice of any variation in hours of work and/or weeks to be worked, prior to this variation coming into effect. Except in exceptional circumstances (e.g. where an employee is absent on long term sick leave) this notice shall be given at such a time as to ensure it covers a period during which the employee is paid and at work.

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6 Emphases added. Clause 2.6 relates to fixed term employees so is not relevant.

2.5.2 Where the employer and employee agree, the hours of work and/or the weeks to be worked may be varied during the twelve month period.

2.5.3 Where the variation referred to in clause 2.5.1 above involves either a reduction or an increase in hours per week and/or weeks per year, the notice period is to allow time for discussions between the employer and employee about the following:

(a) Reasons for the variation;
(b) Whether the variation can be avoided or lessened;
(c) In the case of a reduction in hours, whether that reduction can be absorbed by attrition;
(d) In the case of an increase in hours and/or weeks per year, whether that increase will create any difficulties for the employee;
(e) Whether in a reduction of hours there are alternative hours of work available in the school, with terms and conditions no less favourable. This may involve retraining;
(f) In the case of a reduction in hours of work, consultation on any amendments to the job description which will take into account the reduction in hours applicable to the employee.

Any discussions during this period may involve others in the employee's team.

[42] Surplus staffing provisions are set out in cl 10.2. That clause materially provides that:[7]

10.2 Surplus staffing provisions

10.2.1 The following provisions shall not apply to any fixed term employee (see clause 2.3.3). The provision in relation to staff affected by a merger of two or more schools are set out under clause 10.3 and any provisions in clause 10 will only apply where they are specifically provided for in clause 10.3.

10.2.2 *A surplus staffing situation may arise when the work undertaken by the employee ceases to exist.* This may be the result of the restructuring of the whole or any part of the employer's operations because of, for example:

(a) the reorganisation or review of work;
(b) a change in plant (or like cause) relevant to the individual employee's employment; or
(c) change of status or closure of the school, or the sale or transfer of all or part of the school.

10.2.3 The employer shall, at least one month prior to issuing notice of termination, advise any affected employee(s) of the possibility of a surplus staffing situation within an occupational category in the school.

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7 Emphasis added.

10.2.4 The period of notice is to allow time for discussion between the employer and the employee(s) of the reasons for the possible surplus staffing situation and to determine whether this surplus can be absorbed by attrition. The employer shall consider whether or not it is able to offer an alternative position within the school with terms and conditions that are no less favourable, which may also entail on the job retraining.

10.2.5 If the required number of positions cannot be achieved through attrition (refer clause 10.2.4) and a surplus staffing situation still exists, all available positions in the occupational category will be internally advertised and appointments made from existing employees in that category. Where there is only one position in the identified occupational category in which the surplus exists identification of the position shall be automatic.

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10.2.12 Except as provided under clause 10.2.11 above, where a reasonable offer of employment is not made before the expiry of the notice of termination period the employee will be entitled to redundancy pay calculated as follows:

(a) 6 weeks' pay for the first year of service and two weeks' pay for every subsequent year or part thereof to a maximum of 30 weeks' pay in total.

Notes:

(i) This is calculated on current gross weekly earnings as at the last day of service or on average gross weekly earnings over the previous 12 months service whichever is the greater.

(ii) An employee with less than one year's service shall receive a pro-rata payment.

(iii) For the purposes of the redundancy calculation the definition of service is the same as that for continuous service defined in clauses 6.2.1 to 6.2.4 above provided that no period of service that ended with the employee receiving a redundancy or severance payment shall be counted as service.

(b) All holiday pay and wages owing.

…

[43] I note for completeness that the CEA 2019-2022 contained a new provision under the heading "Variation of hours per week and/or weeks per year". The provision (new cl 2.5.1A) was expressed as a carve out to cl 2.5.1 (which was in precisely the same wording as the same provision in the earlier collective agreement). It applied to employees who "routinely undertake work set out in the Teacher Aide Work Matrix Table" (the Matrix) (which was set out in new cl 3A.3.3), whether that employee was designated as a teacher aide or not. Where the carve-out applied, the employer's

ability to unilaterally vary the hours of work and/or weeks to be worked per year was for a maximum of 25 per cent of the hours and/or weeks the employee was currently employed to work in any 12-month period (cl 2.5.1A). It went on to state that:

> For any variation in excess of 25%, the provisions of clause 10.2 will apply. The employer and employee may agree to vary the employee's hours of work and/or weeks worked per year over and above the 25% maximum. Where this is by agreement, clause 10.2 will not apply.

[44] Clause 2.5.1A attracted attention during the course of evidence and submissions. I understood that Mrs Anderson was contending that she routinely undertook the work of a teacher aide and that she was covered by the Matrix, and that meant that the Board could not vary her hours of work by more than 25 per cent.

[45] I do not consider cl 2.5.1A was engaged. That is because the terms and conditions of employment under which Mrs Anderson was employed were as set out in the IEA, incorporating by reference the CEA 2017-2019 (but with all necessary modifications). As I have said, there was nothing in her IEA to incorporate by reference the terms and conditions contained in any subsequent CEA; and nor is there anything to signify that a variation otherwise occurred to incorporate new cl 2.5.1A.

[46] That then leads to consideration of what relevance, if any, cl 2.5 has to the analysis.

[47] The approach to contractual interpretation for employment agreements is an objective one, the aim being to ascertain the meaning the written agreement would convey to a reasonable person having all the background knowledge that would reasonably have been available to the parties at the time of the agreement.[8] This objective meaning is taken to be what the parties intended.

[48] The hours of work that Mrs Anderson was contractually obliged to work, and the Board was contractually obliged to provide her with, and pay her for, were set by the IEA. Those hours were specified as being full-time hours of work, 52 weeks per year. The agreement was not expressed to be for a fixed term; rather it was for

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8 *New Zealand Air Line Pilots' Assoc Inc v Air New Zealand Ltd* [2017] NZSC 111, [2017] 1 NZLR 948 at [74]–[78].

permanent employment on the agreed hours/weeks basis. In other words, the hours of work and the weeks of work per year were as agreed between Mrs Anderson and the Board.

[49] The focus of argument was not whether or not cl 2.5 was a term of Mrs Anderson's employment agreement, but rather whether it was engaged. In my view it is seriously arguable that cl 2.5 has no application in the present case, and that cl 2.5.1 relates to situations where the hours of work and the weeks worked per year for employees are fixed by the employer on an intermittent basis, indicated by the words "each time" ("Except as provided for in clause 2.6, *each time* the hours of work and the weeks worked per year for employees are fixed by the employer, they shall be fixed by written advice to the employee *for a minimum of 12 months*"). Mrs Anderson's hours of work and weeks for work had been agreed, or "fixed" "by written advice" to her at the time she entered into the IEA, but not for a minimum of 12 months; rather an objective reading of the IEA strongly suggests that the parties agreed that Mrs Anderson would work as a permanent employee on a *full-time ongoing* basis.

[50] To put it another way, Mrs Anderson's IEA expressly guaranteed her 37.5 hours of work per week. Section 67C of the Act permits parties to agree to flexibility in hours of work in relation to days of the week in which work is to be performed and/or for start and finish times of work.[9] It does not, however, permit flexibility in relation to guaranteed hours. This reinforces that cl 2.5 relates to situations where full-time hours of work are not contractually guaranteed.

[51] Notable too is the fact that, while the IEA expressly incorporated the terms and conditions of the CEA, the extent of incorporation was limited. In this regard it was said to be subject to "all the necessary modifications applicable to an individual employment agreement for support staff." In other words, the application of general provisions in the CEA (such as the variation provision) are to be read subject to the specific provisions in the IEA. As I have said, a plain reading interpretation of the IEA is that Mrs Anderson's employment was on full-time hours of work, 52 weeks per year; it did not say (for example) that her hours and weeks of work were fixed for a

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9 Employment Relations Act 2000, s 67C.

one year period and then subject to variation at the Board's instigation. On this basis, any subsequent change to the hours and weeks of work would similarly need to be by agreement, by way of a variation to her IEA. If that is so, the Board was not entitled to unilaterally vary Mrs Anderson's hours of work per week under, or by reference to, the CEA.

[52] In addition to incorporation (of the CEA into the IEA) being limited, the power conferred on an employing Board to vary hours per week and/or weeks per year under cl 2.5 of the CEA is limited. Notably it can only be triggered "each time the hours of work and the weeks worked per year are fixed by the employer … by written advice to the employee for a minimum of twelve months."

[53] Mrs Anderson made it clear that she did not consent to a reduction in her hours and sought to engage with her employer on the issue from the outset. The essence of the Board's case is that it was entitled to unilaterally reduce her hours of work in reliance on cl 2.5 of the CEA. That was the position adopted at the outset in Mr McKinley's letter of 5 August 2020, and was the position pursued in the Authority and again in the Court. In summary the Board says that cl 2.5 allowed a variation of hours of work and pay if three threshold requirements were met, namely consideration of the matters specified in cl 2.4.2; one month's notice in writing was given; and the discussion requirements in cl 2.5.3 were met. The Secretary for Education also submitted that cl 2.5 was engaged in this case, essentially on the basis that Mrs Anderson's hours were fixed when she was first appointed, and after 12 months the Board was entitled to readjust them following the process set out in the CEA.

[54] But even assuming that cl 2.5 could be engaged on these facts, a number of difficulties arise which I turn to deal with.

[55] The Board says that, when properly interpreted, it is entitled to fix the hours by notice to the employee, giving one month's notice of any variation, and then use the notice period to discuss the matters set out at cl 2.5.3, including the reasons for the variation; whether it can be avoided or lessened; and whether there are other opportunities within the school.

[56] On an overly literal interpretation, the employer has a broad power to vary hours of work under cl 2.5, constrained only by process. It is, however, necessary to view cl 2.5 in context. The contextual inquiry includes related clauses in the CEA which inform the correct interpretation of the nature and scope of the provision. And, as Mr Cranney (counsel for NZEI) submitted, the protective purposes of the Act, such as the acknowledgement of the inherent inequality in employment relationships, protecting the integrity of individual choice and the general duty of good faith,[10] are of broader contextual relevance. These protective purposes, including good faith, point away from an expansive interpretation of relevant provisions of the IEA and the CEA, as enabling (with little constraint) the unilateral alteration of terms and conditions of employment, including as to hours of work.

[57] Although not argued, an additional point may be made. As the International Labour Organisation's Declaration of Philadelphia makes clear, a fundamental principle (which New Zealand has endorsed) is that labour is not a commodity and that all workers have the right to pursue their material well-being, through their work, in conditions of (amongst other things) economic security.[11] The International Labour Organisation, which New Zealand is a founding member of, has emphasised that, in order to protect against the commodification of labour, it is necessary to uphold the dignity of workers. I struggle to see how an expansive approach to the interpretative exercise is consistent with these principles, or how such an approach can be seen to uphold the dignity of a worker such as Mrs Anderson; far from it.

[58] The Court has previously emphasised the importance of good faith in the context of bargaining for an IEA. This includes bargaining for a variation; and the good faith behaviour is expected to meet a high standard.[12] Even if the reduction of Ms Anderson's hours is not a variation of the IEA but merely an application of cl 2.5, I do not consider that the reduction can bypass the applicable good faith requirements. The Board was required to act in good faith when exercising the discretion afforded

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10 Employment Relations Act 2000, ss 3-4.

11 Declaration concerning the aims and purposes of the International Labour Organisation (10 May 1944) (Declaration of Philadelphia).

12 *Commissioner of Police v Coffey* [2014] NZEmpC 194, (2014) 12 NZELR 315 at [47]; *National Distribution Union Inc v General Distributors Ltd* (2007) 4 NZELR 215 (EmpC); *Association of University Staff Inc v Vice-Chancellor of the University of Auckland* [2005] 1 ERNZ 224 (EmpC).

to it by cl 2.5, if any such discretion existed in the circumstances. The point is underscored by cl 2.1.1, which, as Mr Cranney pointed out, makes express reference to the statutory good employer obligations imposed by the State Sector Act 1988 (now the Public Service Act 2020).[13]

[59] As I have said, the CEA contained surplus staffing provisions and sets out a process to be followed when such a situation arises. It is clear that cl 2.5 (variation) and cl 10.2 (surplus) are directed at different, but related, scenarios. The employer has the ability to vary hours under cl 2.5 without terminating the employment agreement; the employer has the ability to terminate the employment agreement under cl 10.2 in a situation involving a staff surplus. Where the employer wishes to substantially vary an employee's hours via a reduction, that may trigger a redundancy situation under cl 10.2.

[60] In oral submissions, Mr Cartwright, counsel for the Secretary for Education, submitted that such circumstances (a variation triggering cl 10.2) will be "exceptional". I prefer to express it on the basis that whether or not cl 10.2 is triggered will be fact specific, informed by the words of the CEA and the approach at common law.

[61] Under the CEA, a surplus staffing situation "may arise" where the work undertaken by the employee "ceases to exist".[14] It provides an example, where a "surplus staffing situation" may be the result of restructuring the whole or any part of the employer's operations, because of the reorganisation or review of work. Clause 10.2.2 is therefore a non-exhaustive definition of a surplus staffing situation.

[62] I pause to note that, on the evidence before me, it seems unlikely that a fair and reasonable employer could conclude that the work undertaken by Mrs Anderson ceased to exist. Clearly many responsibilities, particularly those involved as Director of International Students and assisting the school to meet its statutory duties, continued. While the Board contended that the workload reduced due to the onset of

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13 See s 73. See also the analysis of this obligation in *GF v Comptroller of the New Zealand Customs Service* [2023] NZEmpC 101, [2023] ERNZ 409 at [20]-[35].

14 That is the definition in cl 10.2.2.

COVID-19 and the subsequent reduction in international students, Mrs Anderson raised real concerns that her hours were being reduced significantly while there appeared to be only minor changes to her job description, which were not addressed by the Board. However, I put that issue to one side for now because the CEA provides that a surplus staffing situation "may" be triggered where work ceases to exist. I next consider the common law approach to redundancy in the absence of further specificity in the CEA.

[63] It is well established that a position may be redundant where it has been altered to the point that it is not comparable with the position the employee was appointed to.[15] The test is whether a reasonable person, taking into account the nature, terms and conditions of each position and the characteristics of the employee, would consider there was sufficient difference to break the essential continuity of employment.[16]

[64] Turning back to the CEA, interpreting cls 2.5 and 10.2 requires the Court to have regard to what a properly informed objective observer would consider the words to mean. It is unlikely that a literal meaning would be arrived at by the well-informed objective observer, in the sense that the employer could reduce an employee's hours by 99.9 per cent and avoid triggering the surplus staffing provision, instead relying upon cl 2.5. Rather, it is likely that the objective observer would ask whether there has been a sufficient change to the work or the position. If there has, cl 10.2 may be triggered (alternatively the position may be considered redundant at common law).

[65] The fact that the parties to the CEA have struggled over successive negotiations to find a 'threshold' for where hours are reduced to the point of redundancy may be

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15 See for example *Wallis v Carter Holt Harvey Ltd* [1998] 3 ERNZ 984 (EmpC); cited with approval in *McKenna v Affco New Zealand Ltd* [2001] ERNZ 75 (CA) at [17]. Compare *ANZ National Bank Ltd v Svensson* (2008) 6 NZELR 44 (EmpC) at [65], which refers to a "fundamental change" to the employee's position; citing *Parsons v Upper Hutt City Council* [2000] EMHNZ 1025 (EmpC); and *Johnston v Fletcher Construction Co Ltd* [2019] NZEmpC 178, [2019] ERNZ 498 at [47] and [50], which refers to two positions being "sufficiently similar".

16 *Wallis*, above n 15, at 995. The language "superfluous to the needs of the employer" was the definition of redundancy in the Labour Relations Act 1987, s 184, which has carried through in some of the case law by its incorporation in employment agreements. See for example *Auckland Regional Council v Sanson* [1999] 2 ERNZ 579 (CA).

said to reflect an understanding that, if reduced too much, a redundancy situation would arise.

[66] I acknowledge Mr Pa'u's (advocate for the Board) argument that it is difficult to know, with clauses such as these, the exact percent reduction that is available under cl 2.5 before triggering cl 10.2. However, I agree with Mr Pollak and Mr Cranney that it is unnecessary for the Court to alight on a percentage number because I have no trouble concluding that the almost 50 per cent reduction in this case is sufficient. Fundamentally that is because the hours of work and salary for the role were significantly reduced.[17] By reference to the definitions in the CEA, the full-time position Director of International Students was replaced with a part-time Director of International Students position; that clearly makes it of a different nature. It follows that Mrs Anderson's position was indeed made redundant.

[67] That means that the surplus staffing provisions in cl 10.2 of the CEA should have been applied. Rather, the Board sought to vary Mrs Anderson's hours under cl 2.5. That is not what a fair and reasonable employer could have done in all the circumstances at the time it made the decision to reduce the hours for the Director of International Students in the way that it did. There was no formal decision that the work Mrs Anderson was employed to do ceased to exist, nor was there any indication on the material before the Court that the Board undertook any other form of formal redundancy process leading to the disestablishment of the full-time role and establishment of the part-time role.

[68] Mrs Anderson also claimed constructive dismissal. I accept that even if cl 10.2 was not triggered on the facts in this case (which I do not accept), the process followed by the Board was problematic. Clause 2.5.3 requires discussion; discussion connotes a conversation – a sharing of thoughts and information. Based on the evidence before the Court, that is not what occurred. Rather, it had been decided that a variation was in order and matters proceeded on that basis. The evidence suggests an unwillingness to actively engage with Mrs Anderson in terms of her queries and suggestions, and confirmation of a decision that had already been made. The instigation of an

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[17] Compare the discussion in *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 28, [2015] ERNZ 224 at [49]–[57]; and *Johnston*, above n 15, at [47].

investigation into alleged misconduct, in the context within which it occurred, underscored the difficulties with the approach adopted by the Board. It gave rise to a reasonable inference of retaliatory action.

[69] Further, and as s 4(1A)(c) of the Act makes clear, an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment is required to provide the employee affected with access to information, relevant to the continuation of the employee's employment, about that decision. That engagement is required at a stage prior to a decision being made. Even if cl 2.5 of the CEA can be properly interpreted as allowing the employer to avoid the sort of early engagement contemplated by s 4(1A)(c), and the point was not argued, such an interpretation would likely run into the difficulties associated with s 238, which makes it clear that a party cannot contract out of the Act.

Conclusion as to breach

[70] I find that the Board failed to meet its contractual obligations to Mrs Anderson, and also failed to meet its broader obligations, including in respect of being active and constructive; providing relevant information; and considering what Mrs Anderson had to say with an open mind before reaching a concluded view (namely that the variation in hours advised to Mrs Anderson could not be avoided or lessened). When Mrs Anderson continued to question the basis for the Board's actions it initiated a disciplinary process against her. Breach of duty is established.

[71] It is well settled that a breach of duty by the employer that causes an employee to resign amounts to a constructive dismissal, provided it is reasonably foreseeable that resignation would occur having regard to the seriousness of the breach.[18]

[72] In this case the evidence supports a claim that the Board's breach caused Mrs Anderson's resignation, and that resignation was reasonably foreseeable. Mrs Anderson was unjustifiably constructively dismissed in all the circumstances.

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[18] *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372, (1985) ERNZ Sel Cas 136 (CA); and *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW (Inc)* [1994] 2 NZLR 415, [1994] 1 ERNZ 168 (CA).

Remedies

[73] No matter which route is taken, the destination in terms of relief remains the same.

[74] Mr Pa'u submitted that on a de novo challenge it was incumbent on Mrs Anderson to call evidence to support her claim for remedies. He submitted that evidence was lacking in this regard. I do not agree.

[75] Both Mrs Anderson and her husband described the adverse impact of her employer's actions on her, including the significant distress she suffered. She was unable to work, as confirmed by a medical certificate. Her evidence also disclosed that she deeply valued her position at Glenfield College, her shock and distress at losing her job, and the way in which it came about. I have no difficulty concluding on the evidence presented in Court that the circumstances of this case belong in the middle of Band 2 and that an award of $30,000 is appropriate in the circumstances.[19]

[76] As I have found, the redundancy provisions of the CEA were triggered in the circumstances of this case. The CEA sets out the way in which redundancy pay is to be calculated at cl 10.2.12. I did not understand the first plaintiff to be taking issue with the calculation arrived at by the Authority applying cl 10.2.12, if a finding that the clause was triggered was made. The order made by the Authority in respect of redundancy pay owing to Mrs Anderson is accordingly confirmed.[20]

[77] In the Authority, Mrs Anderson claimed six months' lost wages. Since redundancy pay has been awarded, I must consider the counterfactual in order to avoid double recovery.[21] Had Mrs Anderson not resigned (been constructively dismissed), the proper redundancy process would have taken at least two months (one month is required prior to issuing notice of termination under cl 10.2.3 and one month's written

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19 Band 2 is between $12,000 and $50,000: *GF v Comptroller of the New Zealand Customs Service* [2023] NZEmpC 101, [2023] ERNZ 409 at [162].

20 No issue was raised about the award of lost wages in addition to the contractually obligated redundancy pay. See *Helloworld Travel Services (NZ) Ltd v Unsworth* [2023] NZEmpC 180. See too *Board of Trustees of Southland Boys High School v Jackson* [2022] NZEmpC 136, [2022] ERNZ 565.

21 I must assess what remuneration was lost "as a result of the grievance": Employment Relations Act, s 128(1).

notice of termination under cl 10.2.6). Even then, there are multiple responsibilities upon the employer such as making reasonable efforts to locate alternative employment for the employee (see, for example, cl 10.2.5), and the employer has a discretion to extend the notice of termination period so as to fulfil those responsibilities.

[78] But putting those to one side, Mrs Anderson would have been paid at a minimum a further two months at the level of remuneration specified under her IEA, had the redundancy process been followed.[22] As it turned out, Mrs Anderson found alternative employment, which was on lower pay, but did not provide specific evidence as to when she started in that role; it appears it may have been around June 2021. In those circumstances, I may have been inclined to award two months' lost remuneration in its entirety – being the lesser of the "lost remuneration as a result of the grievances" and three months' ordinary time remuneration.[23] However, in the absence of more specific evidence as to her alternative employment, reimbursement of $5,000 is appropriate in the circumstances.

[79] Further, Mrs Anderson is entitled to wage arrears for the period running from 12 October 2020 (or the date on which the reduced hours came into effect for payroll purposes) until the end of her employment, being an unlawful reduction in her pay based on a deficient redundancy process. The Authority's calculation was $7,188 (gross) and I see no basis for reaching a different view. It is accordingly confirmed.

[80] I did not understand the first plaintiff to argue that there should be a reduction in any remedies awarded on the basis of contributory conduct. In any event, I do not consider that Mrs Anderson contributed to the grievance in a blameworthy way that would justify a reduction.[24]

[81] Interest should also be payable in respect of the monetary remedies owed.[25] Such interest is to be calculated in accordance with sch 2 of the Interest on Money Claims Act 2016. The interest on the redundancy pay and wage arrears is to be calculated from the date they would have been due, being 15 January 2021 when Mrs

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22 Clauses 10.2.7–10.2.10.
23 Employment Relations Act, s 128(2).
24 Employment Relations Act, s 124.
25 Schedule 3 cl 14.

Anderson's employment officially ended following the expiration of her notice period. The interest on the compensation for hurt and humiliation and the lost wages is to run from the date on which those payments became due under the Authority's determination.

[82] The Board challenged the Authority's costs determination. The challenge proceeded on the basis that the Authority had erred in its substantive conclusions as to liability. In light of my findings, the Board's challenge to costs in the Authority must be dismissed. The award of costs made in the Authority (namely of $9071.56) is confirmed.

[83] The plaintiff's challenge is unsuccessful, and the following orders are made:

(a) The first plaintiff is ordered to pay to the defendant within a period of 28 days of the date of this judgment -

(i) $30,000 by way of compensation under s 123(1)(c)(i) of the Act;

(ii) $36,230 (gross) by way of redundancy pay;

(iii) $5,000 (gross) by way of lost wages;

(iv) $7,188 (gross) by way of wage arrears;

(v) interest on the sums in (ii) and (iv) calculated from 15 January 2021 until the date of payment; and

(vi) interest on the sums in (i) and (iii) calculated from 27 November 2023 until the date of payment.

(vii) costs of $9071.56 in the Authority.

Costs

[84] If costs cannot be agreed I will receive memoranda, with the defendant filing and serving within 20 working days; the plaintiff within a further 15 working days; and anything strictly in reply within a further five working days.

Christina Inglis
Chief Judge

Judgment signed at 3.30 pm on 22 November 2024