IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2025] NZEmpC 242
EMPC 263/2024

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	TERTIARY EDUCATION UNION First Plaintiff
AND	HUHANA WATENE Second Plaintiff
AND	PRABHAT CHAND Third Plaintiff
AND	WEI LOO Fourth Plaintiff
AND	TE PŪKENGA, NEW ZEALAND INSTITUTE OF SKILLS AND TECHNOLOGY T/A UNITEC Defendant

Hearing:	7–11 April 2025 (Heard at Auckland)
Appearances:	P Cranney, counsel for plaintiffs S Cook and H Wijewardhana, counsel for defendant
Judgment:	7 November 2025

JUDGMENT OF JUDGE KATHRYN BECK

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[1] These proceedings involve a non-de novo challenge to a determination of the Employment Relations Authority.[1]

[1] *Tertiary Education Union v Te Pūkenga, New Zealand Institute of Skills and Technology t/a Unitec* [2024] NZERA 347.

[2] The second, third and fourth plaintiffs are members of the Tertiary Education Union (TEU), the first plaintiff, and employees of the defendant, Te Pūkenga, New Zealand Institute of Skills and Technology trading as Unitec (Te Pūkenga).

[3] The plaintiffs were longstanding employees of Unitec New Zealand Ltd (Unitec). From April 2020 until October 2022, Unitec was a wholly owned subsidiary of Te Pūkenga. On 1 October 2022, it was dissolved into Te Pūkenga as a distinct business division by operation of the Education and Training Act 2020 (the ET Act) from October 2022.

[4] While employees of Unitec and, for a short time, of Te Pūkenga, the plaintiffs were entitled to life and income protection insurance under group policies held by Unitec, the costs of which were met by the employer ("insurance policies"). On 31 March 2023, Te Pūkenga cancelled the insurance policies and the employees ceased to have cover from 4 May 2023. The plaintiffs claim that the cancellation of the insurance policies amounts to a breach of contract and/or a breach of the ET Act. They also say that the defendant did not comply with its consultation obligations under the Employment Relations Act 2000 (the Act) prior to withdrawing the insurance policies.

[5] The Authority determined that, among other things, the insurance policies were a discretionary benefit, not an express term of employment, and that they had not been implied into the terms and conditions of employment.[2] It also found that the consultation process the defendant undertook to remove the insurance policies was full, fair and reasonable, and that their removal was lawful.[3] The plaintiffs' challenge relates to those aspects of the Authority determination. While remedies have been sought in the statement of claim, the parties agreed that it is sufficient for the Court to make findings as to breaches. Remedies can then be left to the parties to attempt to agree and if they are unable to do so, they may seek the assistance of the Court.

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2 At [153]–[154].
3 At [156]–[160].

Issues

[6] The parties have previously agreed that the issues for determination are:

(a) whether the insurance policies for Unitec's employees were a contractual entitlement under the collective agreement/employment agreements;

(b) if the insurance policies were a contractual entitlement, whether the defendant's removal of them amounted to a breach of contract or a breach of sch 14, cl 5 of the ET Act or both;

(c) if the insurance policies were not a contractual entitlement, whether the defendant's removal of them (and the manner of removal) were:

(i) a breach of the defendant's contractual obligation to be fair and reasonable; and/or

(ii) a breach of the defendant's good employer obligations under the ET Act.

(d) whether the defendant complied with its consultation obligations under the Act prior to removing the insurance policies for Unitec's employees;

(e) whether any damages should be awarded to the plaintiffs if any of their claims succeed (and if so, the quantum of such damages);

(f) whether a compliance order requiring reinstatement of the insurance policies should be awarded;

(g) whether interest should be awarded on any amounts awarded by the Court; and

(h) whether any costs should be awarded to either party.

However, given the agreement between the parties in relation to dealing with remedies, only (a)–(d) are dealt with in this judgment.

Were the insurance policies a contractual entitlement?

[7] The plaintiffs claim that the insurance policies were a contractual entitlement. Te Pūkenga says that these were not contractual but instead were benefits that were provided at the discretion of the employer, which could be cancelled at any time.

[8] The argument about whether or not they were a contractual entitlement took a different course in the Court than the Authority.

[9] Mr Cranney, counsel for the plaintiffs, argued that not only was the insurance a contractual entitlement per se but, more importantly, that Te Pūkenga had agreed to continue it as part of the transfer agreement and that this was a contractual obligation in its own right.

Facts

[10] It was unclear when the provision of the insurance policies for employees commenced. However, it was common ground that it had been an entitlement for at least 29 years. The plaintiffs had been employed by Unitec in various roles for an extensive period of time: Ms Watene – over 29 years; Mr Chand – over 22 years; and Mr Loo – 20 years. They all remain employed by Te Pūkenga.

[11] As noted above, the plaintiffs were all members of TEU and had been covered by various collective agreements. It is common ground that the collective agreement does not refer to the provision of insurance policies.

[12] Ms Watene's evidence was that she first became aware of the insurance policies at her first meeting with the chief executive officer of Unitec. He advised her of a number of entitlements including the insurance policies. Her recollection is that she was asked to sign a declaration of commitment to the Crown (which she did). From that point, she received the benefit of the insurance policies along with other employment benefits. She cannot recall what, if anything, was said about the nature of each of the various entitlements.

[13] Mr Loo could not recall how he became aware of the entitlement to the insurance policies but thought it was early on. He also acknowledged receiving annual letters updating him about coverage.

[14] Mr Chand was in a similar position.

[15] None of the plaintiffs produced documentation relating to them personally. However, a letter of appointment (dated 14 December 2006) was produced in relation to a separate employee. That letter sets out terms and conditions and advises the employee that they are employed on an individual agreement based on the terms and conditions of the union collective agreement.[4] It set out the salary and refers to a job description. It then states:

> Should you accept this offer and should the *conditions set out above* be met, please would you sign and return one copy of the letter to the Human Resources Department within 7 working days. If any of your personal details have changed, could you please let them know at this time.
>
> *I have also enclosed details* about the Unitec Superannuation and Insurance Plans. For further information about these please contact your HR Advisor on [phone and extension numbers].
>
> (emphasis added)

[16] The letter attached a number of enclosures including: the collective agreement, a draft individual employment agreement, a tutor training enrolment form, a bank authority form, an IR330 tax code declaration, information on the superannuation and insurance plans, insurance letter and certificate, the code of conduct policy, the outside work policy, staff benefits and the health and safety policy.

[17] Brief information about the group insurance policies was provided in an enclosure headed "Benefits Available to Unitec Employees".

[18] Under the insurance policies, employees were provided with:

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[4] At this period, the union was known as the Association of Staff in Tertiary Education, referred to as ASTE. In 2009, TEU was established as a result of the amalgamation of ASTE as well as the Association of University Staff (AUS).

(a) a lump sum payment in the case of their death or if they became terminally ill;

(b) a disability benefit if they were unable to work;

(c) a partial disability benefit if they were unable to earn 75 per cent of their pre-disability income; and

(d) the ability to access occupational retraining and rehabilitation support.

[19] In relation to insurance cover, a separate letter sent to the same employee on 14 December 2006 states:

> We value our staff members and provide quite a few additional benefits over and above your regular pay. One of these additional benefits is the insurance cover provided by two master policies that we have with Sovereign Insurance. These policies cover all permanent employees who work full time (0.5 FTE and above) with Unitec.
>
> This cover is provided automatically when you join Unitec and provides benefits in the event of your death, your total and permanent disablement, or (in the form of income support) if you are temporarily disabled for longer than 3 months and unable to work as a result.
>
> These are valuable provisions, and many staff members and their families have benefited from the cover these policies provide. We attach a booklet explaining these benefits for you to refer to and keep in a safe place.

[20] A letter dated 4 October 2007 was provided in relation to another employee and had a similar structure to the 14 December 2006 letter of appointment.

[21] Although these letters do not relate to the plaintiffs and were sent after they were employed, it does not seem to be disputed that they are an example of standard correspondence received by employees around that time in relation to the insurance policies.

[22] At least from April 2011, employees began to receive an annual letter from Unitec enclosing an annual member's certificate confirming the renewal of the insurance cover. A letter to an employee dated 1 April 2011 notes:

> This is a valuable benefit which is over and above your salary package so please ensure that your Member Certificate is filed in a safe place along with the Group Insurance Booklet you received from Unitec when you joined.

[23] The letter concludes with the following: "Unitec is pleased to be able to continue to offer these valuable benefits to our staff for another year."

[24] Again, it seems to be accepted that this is an example of the standard correspondence sent at the time.

[25] From at least 2018, an additional clause was inserted into the insurance information sheet as follows:

> The Employer provides the Plan to its employees as a valuable benefit, but has the right to amend or terminate the insurance benefit provided by the Plan at their discretion. The Insurer also has termination rights.

[26] An appointment letter dated 1 June 2018 addressed to an employee did not refer to the insurance policies at all. However, it did provide an online welcome pack which included a welcome video containing information on values, health and safety and, under the heading "Staff Benefits", information about the Unitec work insurance policies. It states:

> Working at Unitec allows you to access and enjoy a number of perks. Aside from working with talented teams, additional benefits include:
> …
> - Discounted insurance and other savings
> - Support for your health and wellbeing.
>
> …
> **Unitec Workplace Insurance Plan**
> Permanent staff who are employed at 0.5 FTE or greater are eligible for the member benefits of the United Workplace Insurance plan. The plan includes life insurance and income protection.

[27] The 2018 "Employee Guide – Unitec Insurance Plan" stated:

> This Employee Guide will help you understand the valuable benefits provided to you by Unitec. The information contained in this guide is a summary only. All effort has been made to ensure that the following information is accurate and correct at the time prepared.

[28] It detailed the nature of the cover provided by Unitec and named the two separate insurance companies. It set out the circumstances under which cover under

the policy would cease, which included "Cancellation of this policy by the insurer(s) or Unitec." In relation to premiums, it noted that "Unitec currently meets all costs associated with the provision of this insurance cover."

[29] At some point and from at least July 2018, the annual individual letter referred to at [22] above was replaced by a letter entitled "[Employee name] Insurance Information" prepared by the broker at the time, Marsh & McLennan Companies. It set out the specific amounts available under the insurance policies. It also stated:

> Unitec New Zealand Limited provides the Plan to its employees as a valuable benefit, but has the right to amend or terminate the insurance benefit provided by the Plan at their discretion. The Insurer also has termination rights.

Analysis

[30] It is a well-established principle that: [5]

> … a contract of employment between employer and employee may comprise terms arising from a number of different sources. Put another way, the formal written employment agreement is never the entire contract of service. It is only one source (albeit often the main source) of contractually binding terms.

[31] Accordingly, although the collective employment agreement does not expressly refer to the provision of insurance policies, these may nonetheless be considered a term or condition of the employment agreement.

[32] It is necessary to consider the available contractual documentation to establish whether the insurance policies form an implied term of the employment agreement. The Court's inquiry into the existence of implied terms, particularly those arising by custom and practice, will be highly dependent on the facts and circumstances of each case.[6] The Court must consider whether custom or practice established by the evidence creates an implied contractual term. Implied terms must be reasonable, certain and notorious/universal.

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5 *Metropolitan Glass & Glazing Ltd v Labour Inspector, Ministry of Business and Innovation and Employment* [2021] NZCA 560, [2021] ERNZ 1006 at [26], citing *NZ Meat Workers and Related Trades Union Inc v AFFCO (NZ) Ltd* (2009) 6 NZELR 643 (EmpC) at [45].

6 *Edminstin v Sandford Ltd* [2017] NZEmpC 70, [2017] ERNZ 329 at [43].

[33] Although there do not appear to be any records prior to 2006, there is no suggestion that the treatment of the insurance policies changed between 1995 when Ms Watene began employment and 2006, the date of the earlier documentation provided to the Court.

[34] The plaintiff employees had been receiving the benefits for an extensive period of time (20 to 29 years). However, extensive time in itself does not elevate a benefit to a contractual entitlement.[7]

[35] Other than Ms Watene, the plaintiffs do not recall when or how they became aware of the insurance policies. They do not recall whether the nature of the benefit was ever discussed or advised to them. As noted above, it is common ground that the insurance policies are not referred to in the collective agreement.

[36] The evidence of the plaintiff employees was that they recall receiving the annual updates but do not recall reading the detail. It is unclear when these updates commenced. However, at least from 2011, Unitec referred to being able to offer the benefits "for another year" and from 2018 it expressly noted that the benefit could be terminated at its discretion. Various other lines in letters have been to the effect that Unitec was "currently" meeting the costs of the insurance policies. There was no evidence that any concerns were raised at the time.

[37] Such statements are not consistent with the insurance policies being a contractual entitlement.

[38] Further, in the early correspondence, the reference to the insurance policies in the various appointment letters provided to the Court[8] follows on from the paragraph referring to the "employment conditions above". Read naturally, this implies that the insurance policies were not part of those employment conditions.

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7 See for example *Edminstin v Sandford Ltd,* above n 6, at [49].

8 See above at [15].

[39] The evidence before the Court supports the argument that, from at least 2006, the provision of insurance policies was regarded as a discretionary benefit, not a contractual entitlement.

[40] Accordingly, while it was a longstanding highly valuable and highly valued entitlement for the employees, I find that it was a discretionary benefit and did not amount to a contractual entitlement.

[41] That said, "benefits" are referred to in the letter of offer of employment from Te Pūkenga dated 29 August 2022 as being "recognised and treated as ongoing".[9] I will say more about that later.

[42] Before dealing with the next issues for determination, it is helpful to consider the events leading up to Te Pūkenga removing the insurance policies.

[43] Te Pūkenga was established on 1 April 2020 under s 222A of the Education Act 1989 (and continued under s 314 of the ET Act) to consolidate all of New Zealand's institutes of technology and polytechnics (ITPs) and industry training organisations into a national education and training provider. The functions and powers of Te Pūkenga are set out in subpt 4 of pt 4 of the ET Act.

[44] Among the ITPs to be consolidated on 1 April 2020 was Unitec Institute of Technology (UIT) which was incorporated as Unitec, a wholly owned subsidiary of Te Pūkenga. Staff who were employed by UIT became employees of Unitec on the same terms and conditions.[10] This was a temporary measure, as all ITPs were required to be dissolved into Te Pūkenga by 31 December 2022 in accordance with sch 14 to the ET Act.[11]

[45] On 1 October 2022, Unitec was dissolved into Te Pūkenga as a distinct business division of the parent entity. Thereafter, the defendant's legal name became "Te Pūkenga – New Zealand Institute of Skills and Technology trading as Unitec" and

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9 See below at [91].
10 Education and Training Act 2020, sch 1 cl 29.
11 Education and Training Act 2020, sch 1 cl 21.

it was held out to suppliers and the public at large in this manner. This was considered a 'lift and shift' of the dissolving entity (Unitec) into Te Pūkenga.

[46] As part of the consolidation process, under sch 14, cl 5(2) of the ET Act, Te Pūkenga was required to offer employment to all Unitec staff (that is, from the former ITP) in substantially the same positions, in the same general locality, on terms and conditions that were no less favourable than their existing ones and to treat their service as if it were continuous.

Even if the insurance policies were not contractual entitlements, was their removal a breach of sch 14, cl 5 of the ET Act?

Facts

[47] Te Pūkenga says that the process it followed to withdraw the insurance policies was what a fair and reasonable employer could have done in the circumstances.

[48] On 15 September 2022, Ms Hutton, interim deputy chief executive of people and culture,[12] wrote to Unitec's insurance broker, Mercer Marsh, informing it that from 1 October 2022, Unitec would no longer be a separate entity. Instead, it would become a business division of its parent entity, Te Pūkenga, and could be co-branded Unitec and Te Pūkenga for the immediate future.

[49] She advised that this was occurring as a further step in the broader reforms to vocational education and while there was a legal change, it was business as usual in terms of their work with the insurers. The existing agreement would be taken over by Te Pūkenga and continue to apply as between Unitec, the insurers and the Unitec business division, but this would happen by operation of law and no update of the agreement was needed. An appendix was provided setting out the effect of the ET Act in relation to the dissolution of various ITPs.

[50] Ms Hutton suggested that if Te Pūkenga had multiple contracts with the same supplier, they would work to standardise a single agreement over time. The letter also

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[12] Ms Hutton was engaged on a fixed-term contract until the end of the year.

advised that Unitec's insurance policies would continue to apply for the benefit of employees of Te Pūkenga within the Unitec business division.

[51] Following that letter, Ms Hutton received requests for information from the insurers, seeking certainty about whether the transition of Unitec into Te Pūkenga triggered the eligibility of non-Unitec staff to receive cover. This was able to be resolved. However, Ms Hutton's evidence was that this inquiry raised the question of what would happen when Unitec fully integrated into Te Pūkenga with no boundaries between institutes and campuses.

[52] On 4 October 2022, four days after employees transferred from Unitec to Te Pūkenga, Ms Hutton emailed a group of Unitec staff from the human resources and finance departments, outlining her concerns about the continuation of the insurance policies due to the inability for employees to be "ringfenced", a process which would close the policies to new employees. Two options were canvassed. The first involved continuing to provide the insurance policies, but only to existing employees under a grandparenting clause; however, this approach was deemed more expensive due to the ageing staff. The second option proposed cancelling the insurance policies and potentially offering a buyout. This was proposed alongside consultation, while clarifying that the insurance policies were not a contractual entitlement. Ms Hutton suggested that there may be other options which she had not arrived at and proposed a meeting to review next steps.

[53] On 5 October 2022, Ms Hutton and Ms Adlam, regional wellbeing and safety lead, met with their Mercer Marsh representative, Ms Condon. The insurers confirmed that the rates would be held until July 2023 but following that, there would need to be a reassessment. Ms Hutton considered that the leadership team needed to make a decision regarding the continuation of the insurance policies once Unitec fully integrated into Te Pūkenga.

[54] Ms Hutton's evidence was that upon full integration, the employees would not be identifiable as belonging to one institute in terms of the areas of work they contributed to. It is common ground that following full integration, employees could

be asked to work across what had previously been regarded as other institutes, provided they were in the same general locality.

[55] There was email correspondence with Ms Condon who, on 17 November 2022, requested confirmation of the exact date of full integration of Unitec into Te Pūkenga and whether Unitec intended to continue cover for existing members once the transition was completed.

[56] Only six weeks after the employees transferred, Ms Hutton advised that it was "most unlikely" that Unitec would continue the insurance policies after 30 June 2023 but this had not been decided; further information was needed from the insurers to inform the decision-making process.

[57] In an email dated 29 November 2022, Ms Hutton advised Ms Condon that she was confident that Unitec continued to meet the plans' eligibility currently, but there was a concern that when employees moved into the new Te Pūkenga structure, that would no longer be the case. Ms Hutton noted her desire to understand whether there was any possible way to continue the benefits for a period of time through, for example, a schedule of names for coverage. However, she also noted that no matter what, "it is a sinking lid" so they would need to move quickly to close entry to new employees and have the executive leadership team (ELT) "make a decision on dates for withdrawal and how to proceed."

[58] She concluded her email to Ms Condon with:

> Alternatively, we just get to yes with this and make a call to withdraw the benefit and do it in the most respectful way (so I would not advise doing its withdrawal without first consulting in a genuine way).

[59] Over the next few weeks, Ms Hutton and Ms Adlam had discussions with leadership teams of both Unitec and Te Pūkenga about possible options for either retaining or withdrawing the insurance policies. Ms Hutton says that they discussed the possibility of Te Pūkenga grandparenting the existing policies. However, this appears to have been dismissed as not being feasible, whereas ringfencing through a named list was, and was in fact implemented by other ITPs in similar situations. It is apparent that the discussions began to focus on the cost, rather than the logistics, of

maintaining the insurance policies, which was forecast to be $447,206 per annum for the year ending 2023. As a result of these discussions, Ms Hutton says she formed the view that it would be prudent to advise the ELT to review the viability of continuing to offer the insurance benefits.

[60] On 6 December 2022, Ms Hutton met with Unitec's ELT and discussed "the concept and rationale for proposing the withdrawal of two Unitec employee insurance benefits." The following day, Ms Hutton wrote to the ELT. She circulated a paper for endorsement, ahead of its scheduled delivery date, and noted that she wanted to seek feedback "in the interests of keeping this going at pace".

[61] Ms Hutton sought the following action:

> If this is acceptable, can I please ask for your review, comments and endorsement or not) by COB tomorrow. This will enable me to provide indicative notice[13] to MercerMarsh prior to the close of December.
>
> (footnote added)

[62] The paper titled "Review of Income Protection and Life Insurance employee benefits" dated 7 December 2022 sought:

> 1. That the Executive Leadership Team (ELT) approve consulting on the withdrawal of the Unitec Income Protection and Life Insurance employee benefits:
>   - that effective 1 January 2023, no new employees are eligible for coverage under these benefit plans; and
>   - that following consultation, these employee benefits are fully withdrawn no later than 31 March 2023.
> 2. That ELT endorse the proposed stakeholder and consultation approach.

[63] In the paper, Ms Hutton set out the background to the provision of the insurance policies. She noted that to the best of Unitec's knowledge, these benefits had been in place since the early 2000s, if not earlier, although I note that it is apparent from the evidence that it was at least from the mid-1990s.

[64] Ms Hutton noted that the insurers were unable to identify a way in which the policies can differentiate between former Unitec employees and/or Te Pūkenga employees, and that the cost of premiums would increase with grandparenting. She

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13 The notice she referred to was notice of termination of the policy.

also noted that, as part of Te Pūkenga, there was a $63 million deficit forecast, and that ITPs had been asked to save $25 million in 2023. Given the cost of the provision of insurance policies, together with the challenges outlined in being able to ringfence Unitec employees, she advised that it was prudent to review the viability of continuing to offer them. Ms Hutton identified three other ITPs offering similar benefits to employees (one of which was a contractual entitlement). After inquiring, these organisations advised they had no plans to review their insurance policies to their employees at that point in time.

[65] Ms Hutton noted that Te Pūkenga's letters of offer for the 1 October 2022 transition outlined that all existing benefits would be retained and treated as ongoing. However, she said that the context had changed and that it was imperative that the organisations take proactive action to avoid the potential risk of the insurers advising Unitec that they no longer met the plan eligibility terms.

[66] Ms Hutton set out the options that were under review. One was to retain the benefits. However, she noted her view that this was not feasible due to the significant annual cost and advice from the insurers regarding the inability to place guardrails around Unitec employees. The second option was to run the policies out to 30 June 2023. However, she did not consider this option feasible as the premiums would increase. She went on to state that she did not see any reason to draw the situation out, particularly with the savings against the budget, and that postponing the withdrawal would mean less budget savings.

[67] Ms Hutton recommended cancelling the policies by 31 March 2023 as this would allow suitable time for consultation with employees, plus nine months of budget savings ($335,000), thus reducing the need to budget savings through headcount reductions. She recommended consulting on withdrawing the policies effective 31 March 2023 as this allowed Unitec time to provide 90 days' indicative notice to Mercer Marsh and sufficient time to consult with the employees on the withdrawal of the plans. She went on to recommend that:

> Unitec provides 90-day notice to the insurers now, with the proviso that this is *indicative* with the final decision based on consultation with employees. To make a definitive decision to withdraw these benefit offerings prior to the

> outcome and decision from consultation would be viewed as pre-determination.

[68] In response to Ms Hutton's 7 December 2022 email attaching the report and seeking feedback and endorsement by circular email, Peseta Lotu-Iiga, executive director Manukau Institute of Technology and Unitec, responded the next day:

> Thanks for the work on this. I also endorse the paper as I believe the benefit is discretionary and it is reasonable and justified to remove the benefit in all the circumstances. … let's start preparing the documents so we can follow this consultation timeline in the new year.

[69] On 12 December 2022, Ms Condon again requested a definitive date when Unitec would dissolve as a business unit of Te Pūkenga and asked whether, when it did dissolve, it was the intention that the scheme would be ringfenced and closed to new members. She noted that, in the circumstances, ringfencing is typically what occurs in the marketplace. Ms Hutton responded that ringfencing was "not the intention" but that was dependent upon the outcome of consultation and a final decision on withdrawing the benefits.

[70] There was ongoing correspondence between Ms Condon and Ms Hutton in relation to the future of the insurance policies and the information required by the insurers.

[71] In a more detailed email on 12 December 2022, Ms Hutton wrote to Ms Condon advising the insurers that in early 2023, Unitec intended to commence a consultation process with employees about the proposal to withdraw the benefit offerings. She noted:

> As we plan to consult with our people, and we expect as a result of consultation there could be some level of challenge, despite that we feel that removing the benefits is justified, we need to go through this process and arrive at a definitive decision before confirming that *they will definitely be withdrawn*.
>
> (original emphasis)

[72] Ms Hutton set out the timeline for the consultation and noted that:

> … we feel the necessity to withdraw these benefits is regrettable (notwithstanding consultation), but we believe the reasons to do so are very genuine and compelling and for these reasons (not outlined here but they will be to our employees in consultation), next steps are necessary.

[73] Indicative notice of cancellation was given to the insurers at that time, even though the consultation had not yet started.

[74] At the end of Ms Hutton's fixed term contract, the process was taken over by Ms Adlam, who was a human resources business partner/health and safety manager.

[75] The consultation process began in January 2023. This was led by Peseta Lotu-Iiga.

[76] On 19 January 2023, Peseta Lotu-Iiga sent an email to all staff proposing the withdrawal of the insurance policies, effective from 31 March 2023. The email stated:

> With the move of Unitec to Te Pūkenga, the insurer has informed us it will be difficult to maintain the benefits in their current form, due to the complexities of the policy ownership and the potential risk that Unitec will no longer meet the plan eligibility.

[77] In addition to this explanation, cost savings were also identified as necessary for financial sustainability in 2023. The email noted that although alternative options (such as grandparenting) had been explored, insurers had advised Unitec that the costs of premiums would increase as a result. Staff were initially given three weeks to consider the proposal and provide feedback by 10 February 2023.

[78] On 10 February 2023, Mr Loo wrote to Unitec that at the latest ELT/TEU Unitec branch catchup, Unitec had undertaken to provide evidence of efforts to retain or at least find alternative insurance policies for staff. He asked that his email be sent to the group. No such evidence was provided to the Court.

[79] On 9 March 2023, Peseta Lotu-Iiga wrote to all staff advising that 86 items of feedback had been received and that consultation was extended by a further week to close on 16 March 2023.

[80] The proposed date for withdrawal of the insurance policies was also extended to 21 April 2023, giving employees more time to explore alternatives, including an offer by the insurers to provide individual coverage.[14] Peseta Lotu-Iiga advised that Unitec would consider any further feedback before making a final decision with the aim of sharing the feedback by 23 March 2023.

[81] Alongside the 9 March 2023 email, a summary of responses and feedback was provided. It identified key themes which had emerged from the feedback. Of the 86 who provided feedback, 84 disagreed with the proposal. Significant time and effort had gone into the feedback with a focus on the alleged complexities of continuing the policies and proposing alternatives to removal. The Tertiary Institutes Allied Staff Association (TIASA) and the TEU both disagreed with the proposal.

[82] Questions seeking clarification on the policy ownership difficulties and complexities went unanswered.

[83] I consider that it was at this point that Unitec advised employees of what was in fact the key driver for the removal:

> … the primary reason that we have proposed the withdrawal of this benefit is that Unitec's pathway to financial sustainability in 2023 means we must make substantial ongoing cost savings. Withdrawal of this benefit is a significant cost saving that will help to mitigate the need for further cost savings that would otherwise be necessary.

[84] Unitec then moved away from the reference to policy ownership difficulties and complexities to discuss cost. However, it did maintain that "there are some complexities of policy ownership" and that insurers had advised it that when employees transfer, "there will be no practicable way to distinguish former Unitec employees from all current Te Pūkenga employees".

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[14] The insurers offered employees (who were covered prior to 1 January 2023) the option to continue their insurance policies without undergoing medical assessments, provided this offer was accepted within 60 days of the group coverage ending. Employees were required to negotiate directly and individually with the insurers.

[85] TEU members requested a meeting but were advised that in lieu of that proposed meeting, the consultation process would be extended to allow staff a further opportunity to express themselves before a decision was made.

[86] The financial implications of retaining the insurance policies were restated in one of the key themes in the summary under "cost savings", which explained:

> This plan constitutes a significant cost for Unitec, being approximately $447,000 annually. Accordingly, withdrawal of this benefit would result in a significant cost saving.

[87] Alternative solutions were proposed by the unions and those providing feedback. However, it is apparent from the summary document that the financial impact of continuing the schemes was the key driver for the withdrawal. There is no evidence of the alternatives proposed being considered. In relation to alternative solutions, the feedback summary restated "going forward, there will be no way for the insurer to differentiate between former Unitec employees and all Te Pūkenga employees."

[88] On 31 March 2023, Ms Adlam wrote to Mercer Marsh, advising that a letter would be sent for the termination of the insurance policies effective 30 April 2023.

[89] Peseta Lotu-Iiga's evidence was that on 5 April 2023, having considered all of the feedback, Unitec decided to proceed with the proposal to terminate the staff insurance policies. On the same day he emailed all staff to confirm that the insurance policies would be withdrawn. The reason given for the decision was to avoid having to make cost savings in other arears so as to ensure financial viability.

Analysis

[90] Schedule 14 cl 5 of the ET Act states:

> **5 Employment of Te Pūkenga—New Zealand Institute of Skills and Technology subsidiary employees by Te Pūkenga—New Zealand Institute of Skills and Technology**
>
> (1) The chief executive of Te Pūkenga—New Zealand Institute of Skills and Technology must identify the employees of the Te Pūkenga—New Zealand Institute of Skills and Technology subsidiary—

(a) whose duties overall are required by Te Pūkenga—New Zealand Institute of Skills and Technology to carry out its functions; and

(b) whose positions are to cease to exist as a result of the dissolution of the Te Pūkenga—New Zealand Institute of Skills and Technology subsidiary.

(2) An employee who is identified under subclause (1) must be offered equivalent employment by Te Pūkenga—New Zealand Institute of Skills and Technology, being employment that is—

(a) in substantially the same position; and

(b) in the same general locality; and

(c) on terms and conditions (including any terms and conditions relating to redundancy and superannuation) that are no less favourable than those applying to the employee immediately before the date on which the offer of employment is made to the employee; and

(d) on terms that treat the period of service with the Te Pūkenga—New Zealand Institute of Skills and Technology subsidiary (and every other period of service recognised by the Te Pūkenga—New Zealand Institute of Skills and Technology subsidiary as continuous service) as if it were continuous service with Te Pūkenga—New Zealand Institute of Skills and Technology.

(3) If the employee of the Te Pūkenga—New Zealand Institute of Skills and Technology subsidiary accepts an offer of employment under subclause (2), the employee's employment by Te Pūkenga—New Zealand Institute of Skills and Technology is to be treated as continuous employment, including for the purpose of service-related entitlements, whether legislative or otherwise.

(4) An employee of an Te Pūkenga—New Zealand Institute of Skills and Technology subsidiary who is offered employment under subclause (2) is not entitled to receive any payment or other benefit on the ground that the employee's position in the Te Pūkenga—New Zealand Institute of Skills and Technology subsidiary has ceased to exist whether or not the employee accepts the offer.

(5) This clause overrides—

(a) Part 6A of the Employment Relations Act 2000; and

(b) any employee protection provision in any relevant employment agreement.

[91] Additionally, each employee agreed to the terms of a transfer by signing a letter dated 29 August 2022. That letter set out an offer of employment from Te Pūkenga:

> As of 1 October 2022, Te Pūkenga is pleased to offer you employment in the same capacity as your current role, in the same location, and on the same terms and conditions as outlined in the current collective agreement with the Tertiary Education Union (TEU). This means that your service with Unitec New Zealand Ltd, and *all employment related processes and benefits, including your current leave entitlement, will be recognised and treated as ongoing*.
>
> (emphasis added)

[92] The letter also notes the employee's agreement that they would not be paid any entitlements that would otherwise be paid when their employment with Unitec ended, such as outstanding notice, leave entitlements and redundancy compensation. That was consistent with the provisions of sch 14, cl 5(4) and 5(5) of the ET Act.

[93] Mr Cranney submits that even if the insurance policies were not a contractual term of the employee's employment, it was captured by the phrase "terms and conditions" in sch 14. In particular, those terms and conditions were to be no less favourable than those applying immediately before the date 29 August 2022. He also submits that in any event, the letter signed by each plaintiff employee individually goes further than cl 5 of sch 14. He argues that the letter specifically stated that all employment-related processes and benefits would continue and that by making this offer to the employees and on signing it, Te Pūkenga committed to continuing those benefits (whether they were contractual or not). He says that it is this contractual commitment that Te Pūkenga has breached by taking steps, immediately after transfer, to cancel the insurance policies.

[94] Mr Cranney submits that the purpose of sch 14 was to provide the employees with "equivalent employment". He argues that to take steps to remove such a valuable and valued benefit within days of the transfer is inconsistent with that purpose.

[95] He does not suggest that it can never be reviewed, but submits that to do so within what he refers to as four days of transfer, is neither fair nor reasonable.

[96] The defendant says that it has complied with its commitment. It argues that just as the 29 August 2022 letter continued the benefit, it also continued the right to cancel or terminate that benefit at Unitec's (now Te Pūkenga's) discretion. It accepts that it could only cancel provided it followed a proper process. It says it did so.

[97] I do not consider that the provisions of sch 14 or the letter of 29 August 2022 were intended to elevate something that was previously a discretionary benefit to become a contractual entitlement. The purpose was to ensure that the transfer was on terms that were substantially similar. Having found that the insurance policies were a discretionary benefit, it follows that Te Pūkenga could withdraw them at its discretion.

Mr Cranney's description of the timing of the removal is also not entirely fair. The employees transferred on 1 October 2022. The consultation commenced in January 2023 and the benefit was removed effective 4 May 2023. However, to take steps to remove that benefit within a matter of months of advising employees that they would be "treated as ongoing" is potentially problematic. The ongoing obligations of good faith under s 4 of the Act sound particularly loudly here and are dealt with below.

[98] Mr Cranney has submitted that such actions are in breach of the good employer obligations under s 597 of the ET Act, although he did not expand on this argument. Having reviewed those provisions, I do not consider that they are particularly engaged in these circumstances, other than that Te Pūkenga is required to operate an employment policy containing provisions generally accepted as necessary for the fair and proper treatment of employees in all aspects of their employment.[15]

[99] Accordingly, while the insurance policies were not a contractual entitlement and their removal does not engage good employer obligations under s 597(2), Te Pūkenga is still required to undertake a process consistent with its obligations of good faith.

Did Te Pūkenga comply with its consultation obligations prior to removing the insurance benefits?

Analysis

[100] There are significant issues in relation to the way in which Te Pūkenga conducted the consultation process with the employees and the union.

[101] Good faith in these circumstances required that Te Pūkenga genuinely consult with the employees and the union before making a decision to withdraw the insurance benefit. I did not understand it to be disputing this requirement.

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15 Education and Training Act 2020, s 597(2).

[102] A good faith consultation process requires:[16]

> … more than mere notification, that the change should not be made until after consultation, that the parties being consulted should know what is proposed before they can be expected to give their views, and should have a reasonable opportunity to do so, that an effort must be made to accommodate their views, and that it involves a statement of proposal not yet finally decided upon, listening to what others have to say, considering their responses and then deciding what will be done.

[103] Dealing in good faith requires parties to be active and constructive in establishing and maintaining a productive employment relationship, which includes an obligation to be communicative and responsive – good faith also requires, but is not limited to, not directly or indirectly misleading or deceiving or engaging in conduct that might be likely to mislead or deceive.[17]

[104] It is apparent from the documentation reviewed above that the proposal to remove the insurance policies was driven by cost, as opposed to purported complications arising from the insurance policies.

[105] While Ms Hutton made the implications of ringfencing appear complicated, it was apparent that this complication was overstated, and it would have been possible to ringfence the existing employees via a naming schedule.

[106] Such an arrangement would have resulted in increased premiums as the ages of existing members increased without new members lowering the average age; however, no financial analysis was undertaken to confirm the future cost, such as assessing the financial implications of employees leaving or retiring on the costs to the institution in the long term.

[107] Ms Adlam's evidence was that if Unitec did not consider withdrawing the benefits on its terms, the insurers would likely terminate the policies without any input from Unitec on the basis that it did not meet the eligibility terms after its transition. In that case, Unitec would not have been able to consult with staff on the potential

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16 *Toll NZ Consolidated Ltd v Rail & Maritime Union Inc* [2004] 1 ERNZ 392 (EmpC) at [91].

17 Employment Relations Act 2000, s 4(b)(i) and 4(b)(ii); and *New Zealand Amalgamated Engineering, Printing and Manufacturing Union Inc v Carter Holt Harvey* [2002] 1 ERNZ 597 at [167].

cancellation or have leverage in terms of how the insurance policies would be terminated (that is, negotiate terms such as allowing staff to transition to their own policies without having to undergo medical assessments or other eligibility requirements).

[108] Given that other ITPs were able to continue their various arrangements, and the advice from Ms Condon that ringfencing was typically what happened in these circumstances,[18] I consider this concern to be disingenuous and overstated.

[109] The merger could be managed and had previously been managed with ringfencing arrangements by other ITPs, who appear to have been able to deal with the "complexities" and retain their insurance policies.

[110] Considerable time and effort were put into the feedback by the union and employees on all the concerns raised by Te Pūkenga. The summary document demonstrates that information was sought by employees in relation to the purported policy ownership difficulties and complexities. However, Unitec does not respond to those concerns in the summary document; nor does it respond in correspondence which specifically requested that evidence be provided in relation to these stated issues. Further, it repeated references to complexities in the feedback summary document and stated that the insurer had advised that there was no way to distinguish between employees.[19]

[111] The prospect of cancellation of the insurance policies was first raised with staff by 19 January 2023; however, it was not until the second part of the consultation process on 9 March 2023 that the issue of cost saving was stated as the primary driver.

[112] Further, it was not disclosed as part of the consultation process that other ITPs had retained their similar benefits.

[113] To focus on such alleged complexities as a driver for the proposal when it was not in fact the main driver was inaccurate and misleading. To advise staff that the

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18 See above at [69].
19 See [84] above.

insurer had advised that there was no way to distinguish between employees when Ms Condon had advised that ringfencing was "typically what occurs in the marketplace" was also misleading and, as such, a breach of the obligations of good faith owed to the employees.

[114] The evidence further establishes that from the outset, Te Pūkenga did not have an open mind. Once Ms Hutton put to it that it could save $447,000 by withdrawing the insurance policies, the evidence illustrates that it was not willing to and did not consider any alternatives. In that way it was predetermined.

[115] This is illustrated in a number of documents referred to above:

(a) Ms Hutton's correspondence at the outset where she stated that it was "most unlikely" that the insurance policies would continue and that she needed to move quickly to have the ELT "make a decision on dates for withdrawal and how to proceed";[20]

(b) Ms Hutton's correspondence with the ELT seeking endorsement that would enable her to "provide indicative notice" of termination to Mercer Marsh;[21]

(c) Peseta Lotu-Iiga's response that he endorsed the paper and that it "was reasonable and justified to remove the benefit in all the circumstances";[22]

(d) Ms Hutton's correspondence of 12 December 2022 advising Mercer Marsh that ringfencing was not the intention, that they needed to go through the process and arrive at a decision "before confirming that *they will definitely be withdrawn*", then giving *indicative* notice of cancellation prior to consultation even beginning; (original emphasis);[23] and

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20 See above at [56]–[60].
21 See above at [61].
22 See above at [68].
23 See above at [71]–[73].

(e) Ms Adlam's advice to the insurers, on behalf of Te Pūkenga, of cancellation of the policies before Peseta Lotu-Iiga purported to make the decision to terminate them.[24]

[116] Advising the employees that it had not yet made a decision was also misleading. Continuing to maintain that stance was inconsistent with the obligation of good faith, when it was apparent that in the face of the cost saving, there was nothing that the employees could say to change Te Pūkenga's mind.

[117] The consultation process was an exercise in form over substance.

[118] To have a closed mind and a predetermined outcome is in clear breach of s 4 of the Act, both in spirit and content. Te Pūkenga was not responsive and communicative. I find that Te Pūkenga did not comply with its consultation obligations under the Act prior to removing the benefits of the insurance policies from the employees.

[119] Further, I find that the content of such consultation was misleading in part and accordingly in breach of good faith obligations under s 4(1)(b) of the Act.

Remedies

[120] I have not been asked to deal with the issue of remedies as the parties wish to have the opportunity to address this themselves in the event the Court finds there was a breach.

[121] I endorse this approach in this instance. The evidence was that Unitec and the union had a healthy and constructive relationship, as did Unitec with its employees prior to the events in these proceedings. This situation has understandably harmed that relationship. I am hopeful that constructive engagement on the issue of remedies will go some way to addressing that harm and rebuilding the employment relationship.

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[24] See above at [88]–[89].

Outcome

[122] Declarations are appropriate.

[123] Te Pūkenga failed to comply with its consultation obligations prior to removing the insurance benefits.

[124] Te Pūkenga entered the consultation having already determined the outcome in breach of s 4(1A) of the Act.

[125] Te Pūkenga's consultation material was misleading in part and accordingly in breach of good faith obligations under s4(1)(b) of the Act.

[126] Costs are reserved. In the event the parties are unable to agree on costs, the plaintiffs will have 14 days from the date of this judgment within which to file and serve any memorandum and supporting material, with the defendant having a further 14 days within which to respond. Any reply should be filed within a further seven days.

Kathryn Beck
Judge

Judgment signed at 5.45 pm on 7 November 2025