

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 145/10  
5089543

BETWEEN

JENNIFER HENSHAW  
Applicant

AND

AUCKLAND INSTITUTE OF  
STUDIES LIMITED  
Respondent

Member of Authority: R A Monaghan

Representatives: G Finnigan and A Williamson, counsel for applicant  
A Caisley and R Larmer, counsel for respondent

Investigation meeting: 7 and 8 May, 14 September 2009

Submissions received: 14 and 23 September 2009

Determination: 26 March 2010

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Jennifer Henshaw says her former employer, Auckland Institute of Studies Limited (AIS) dismissed her unjustifiably on the ground of redundancy. She accepts there was a redundancy situation, but says a number of elements of the selection for redundancy and the implementation of it made her dismissal unfair and unjustified.

[2] Ms Henshaw has also raised separate disadvantage grievances in respect of the unfair and unjustified elements of her redundancy.

[3] Issues arising from the elements of the redundancy said to be unfair and unjustified are whether:

- a. Ms Henshaw's selection for redundancy was unjustified in that the human resources manager, who was married to one of the other affected staff members, was involved in the selection process;
  - b. the circumstances of the employment of the affected staff member were unfair to Ms Henshaw so that, but for those circumstances, Ms Henshaw's redundancy would not have been necessary;
  - c. the selection criteria were fair and reasonable, were applied fairly and reasonably, and were applied accurately;
  - d. the moderator appointed as part of the selection process was independent;
  - e. the pool of affected staff members should have been limited to the arts programme rather than extending across programmes to include the international business programme in which Ms Henshaw was employed;
  - f. AIS should have sought voluntary redundancies; and
- (vii) the implementation of Ms Henshaw's redundancy was otherwise fair.

[4] Ms Henshaw raised an additional disadvantage grievance alleging that, contrary to an understanding she had to the opposite effect, after her redundancy she was not offered relieving or fixed term work available in her area of expertise.

### **Background**

[5] AIS is a private provider of tertiary education, predominantly to international students. It offers a range of certificate, diploma and degree courses - including an MBA course - in the areas of business, tourism, travel, hospitality, English and other languages and cultures, and IT. The courses are organised with reference to three main programmes: international business; arts; and tourism and travel.

[6] It is open to students enrolled in one programme to take courses offered in another. This is facilitated in that a qualification offered under a particular programme may require the completion of core compulsory courses, supplemented with additional elective courses. Further, and by way of example, qualifications involving tourism management would include courses offered by the international

business programme. Indeed the president of the AIS, Dr Richard Goodall, does not encourage a 'silo' approach to the programmes.

[7] During the course of her employment Ms Henshaw held various teaching and administrative roles associated with the international business programme. She began her employment at the AIS St Helen's campus in July 1994, in a part time capacity. In February 1996 she obtained a full time position. As at the date of her redundancy she was a senior lecturer and deputy head, international business programmes. Her role incorporated administrative duties and teaching one course per semester.

[8] In 2006 concerns about falling student numbers were developing. In a memorandum to staff dated 27 September 2006, AIS informed staff that insufficient funds were available to match its outgoings. It identified the corrective action it was taking including: a freeze on new appointments; the possibility that some full time positions would be downsized to part time positions; and redundancies where surplus staffing was identified. In case of the latter, voluntary redundancies would be invited.

[9] There was an update in the form of a memorandum dated 7 December 2006, from the academic director Dr Michael Roberts, in which staff were advised of external developments with the potential to 'turn the tide' and of internal 'stringency' measures concerning timetabling and workloads.

[10] Concerns continued in 2007. Dr Goodall advised staff by individualised letters dated 7 February 2007 that the prospects of an upturn later in 2007 were not good. The numbers of students being enrolled meant it was necessary to reduce quickly the programmes and courses to be offered. Changes would be needed to degree programmes, certTEFL, Travel and Tourism, IT and certificate in degree foundation studies. Meetings would be held in order to consult on processes for ascertaining who would be made fully or partially redundant.

[11] By individualised email messages dated 9 February 2007 from the human resources manager, Anna Kedrinskaia, staff members were advised that the range of programmes and courses being offered was to be rationalised and this would impact on staffing requirements. Staff in programmes where reduced teaching was available would be scored with reference to a range of criteria. If a full teaching load was not

available the affected individual would be offered hours of work reduced in proportion to the available work, or an hourly rate agreement where ongoing demand was envisaged, or redundancy if there was no teaching available and the individual did not agree to a reduction in work arrangements.

[12] At the same time AIS carried out a detailed analysis of projected enrolments and workloads in order to plan the rest of the year. It convened a meeting of the academic staff on 23 March in order to discuss the result. Among others, those attending were: Dr Goodall; Dr Roberts; Ms Kedrinskaia; and Ms Henshaw and a number of her colleagues from the academic staff. Dr Goodall spoke of the commercial pressures while Dr Roberts spoke of the declining enrolment patterns. Ms Henshaw asked if redundancies would be required, to which the reply was that was not yet known.

[13] The meeting was followed up and summarised in an email message from Ms Kedrinskaia dated 27 March 2007. The message was concerned with sharing information about past and projected enrolments, and planning for the second semester. Staff feedback was sought. The next stage was to be the preparation of a draft timetable for the semester.

[14] A further meeting was convened on 5 April 2007. Its purpose was to discuss input received from staff, and to present AIS's proposals. Dr Goodall again presented material regarding past and projected enrolments, and showing whether AIS intended to offer particular courses in the second and third semesters of 2007. He advised there could be reductions in the number of academic staff. Ms Kedrinskaia presented draft redundancy selection criteria. The criteria were obtained from a template AIS had developed over approximately the last 10 years and applied in various departments. Responses to the matters discussed at the meeting, including the draft selection criteria, were invited.

[15] A number of staff members responded in writing. In particular the staff of the international business programme provided detailed written feedback as a group, in a lengthy document dated 15 April 2007. The document raised questions and made suggestions about the draft selection criteria, commented on matters of timetabling and workloads, and made further requests including what amounted to a request for

detailed disclosure to the staff of the completed forms showing the assessments made under the selection criteria. Finally it asked that an independent expert be involved in the workload estimation process.

[16] Drs Goodall and Roberts considered the responses. They prepared a detailed written reply, dated 18 April 2007, which Ms Kedrinskaia also signed. The reply included further explanations of some of the selection criteria, some revisions, an agreement to allow self assessment under the criteria, and rejection on privacy grounds of the request that completed assessment forms be shared with the members of the staff. The reply also said there was no need to appoint an expert to address the workload estimation process, but an independent moderator was to review the self assessment forms.

[17] The reply was presented at a meeting on 18 April. Drs Goodall and Roberts and Ms Kedrinskaia attended, as well as members of the academic staff.

[18] A further meeting was held on 20 April 2007, to answer any remaining questions. This was a smaller meeting, with only 6 staff members attending. Ms Henshaw was one. During the discussion a concern was raised on her behalf to the effect that she would be disadvantaged under the selection criteria because her length of service and reduced teaching load created limited opportunities to score points in respect of some criteria, while not in itself being sufficiently recognised.

[19] As a generalised query about the weight to be given to length of service and additional duties at AIS, the question was fair and was answered. The assessment form made provision for staff to raise any additional matters they considered relevant, and Dr Roberts was willing to take such matters into account. This method of addressing length of service and additional duties under the criteria was within the scope of the discretion allowed to the management in the matter.

[20] Ms Henshaw handed in her completed self assessment form on or about 23 April. It, together with those of the rest of the affected staff, was forwarded to the moderator for review, then to Dr Roberts for his assessment.

[21] On the morning of 27 April Dr Roberts telephoned Ms Henshaw, saying he had some queries about her form. He asked about her experience as a supervisor at a supermarket, and her duties at New Zealand Post (formerly the Post Office). The questions were relevant to the points he gave under the criterion of 'business experience in the field in the area of teaching subjects', and were asked because Dr Roberts sought to assess the management role associated with the positions Ms Henshaw had identified. It is likely Dr Roberts also explained to Ms Henshaw that there was a difference between the moderator's assessment and hers on that criterion, and he needed more information. Otherwise he did not indicate the score he had in mind, or that the outcome could be significant to the retention of her position.

[22] Ms Henshaw's self assessment gave her 24 points out of 35. The moderator gave her 18 points while Dr Roberts gave her 19.5. Both the moderator and Dr Roberts scored Ms Henshaw in the lowest four. The lowest four were to be made redundant.

[23] On the afternoon of 27 April 2007 Ms Henshaw was advised by letter of the same date that she had been selected for redundancy. Dr Roberts handed the letter to her in person, but the letter carried only Ms Kedrinskaia's name and signature.

[24] I turn now to address the elements of the redundancy said to be unfair and unjustified and with reference separately to whether any of them amount to disadvantage grievances, before setting out my conclusion as to whether cumulatively they give rise to an unjustified dismissal.

### **Role of the human resources manager**

[25] Ms Kedrinskaia was appointed to AIS as a human resources advisor in 2006. She married one of the staff members affected by the redundancy situation, Patrick Fuss, later that year. She was appointed as human resources manager in or about early 2007.

[26] Ms Kedrinskaia's - and AIS' - view of her role in the redundancies was that she was to ensure a correct process was properly followed, and to provide administrative support. She provided a template for the draft selection criteria, but did

not create it herself and did not make the decision about whether or how it should be adjusted to take account of staff feedback. She worked on assembling information about teaching schedules and hours of work, and presented that information, but was not the decision-maker in respect of courses to be offered or staff to be assigned to teach them.

[27] Dr Roberts was wholly or substantially the decision-maker regarding the final form of the selection criteria. He also made the final assessments of the individual staff members under those criteria, and in turn of who would be made redundant.

[28] Even so the staff had reason to be concerned about a perception of bias or a conflict of interest. Ms Kedrinskaia's involvement in meetings, and the appearance of active involvement in the redundancy process by the inclusion of her name on documents such as the 18 April response, was inflammatory to people whose employment could be in jeopardy. In such a context, issuing Ms Henshaw's advice of redundancy in Ms Kedrinskaia's name was not a good exercise of judgment.

[29] One of the affected staff members set the concern out in a letter to Dr Roberts dated 13 April 2007. Without making any accusation against Ms Kedrinskaia, he pointed out that it was inevitable that confidence in the integrity of the process would be undermined by her involvement and the possibility that outcomes would be contested was greatly increased. I agree with that view.

[30] It appeared the expectation at management level was that Dr Roberts would address this concern, but the evidence about whether and how he did so was unclear. It is likely he gave broad assurances that the matter would be managed appropriately directly to the person who raised the concern. Notes of the meeting with staff of 18 April record that Dr Goodall explained Ms Kedrinskaia's involvement was to ensure the correct process was followed and to provide administrative support.

[31] The parties' independent recall of this varied, but even if I accept the above action was taken it was too late and did not address sufficiently the perceptions of bias and conflict of interest.

[32] In that I accept Ms Kedrinskaia was not the decision-maker, and her role was more limited than might have appeared to the staff, I distinguish the circumstances from those in **Bowden v News Media (Auckland) Limited**.<sup>1</sup> Because Ms Kedrinskaia was not the decision-maker, I do not consider the perception of bias and conflict of interest - although a flaw in the process - rendered Ms Henshaw's redundancy unjustified.

[33] The matter was also raised as a disadvantage grievance. I have found the perceptions of bias and conflict of interest were not sufficiently addressed. This was unjustified. That there was gossip and ill-feeling about Mr Fuss made it even more important to explain Ms Kedrinskaia's role with more specificity, and to distance her more clearly from the decision-making part of the redundancy process. At the least her role should have been explained before the commencement of the process, with any concerns raised about it also being addressed at that time. A preferable alternative might have been to engage an independent advisor.

[34] In order to find there is a personal grievance of this kind I must find Ms Henshaw was disadvantaged in her employment by an unjustified action of the employer's. Here Ms Henshaw distrusted the selection process, which in the circumstances was eminently predictable. At the same time much of her evidence bearing on this distrust was concerned with gossip and some unhelpful accusations against Mr Fuss. Had matters ended there I would have declined to find she was disadvantaged in her employment by an unjustified action of her employer's. However I conclude that failures of the kind set out above introduced a further element, to the extent that I find Ms Henshaw was disadvantaged by an unjustified action of her employer's.

[35] No loss of remuneration flowed from the resulting personal grievance. The appropriate remedy is an order for compensation for injury to Ms Henshaw's feelings caused by the grievance.

[36] Because of the limited ground on which it rests, such a grievance would in general attract a modest award. Further while I accept there was some injury to Ms

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<sup>1</sup> Employment Tribunal Auckland, 21 July 1992, AT 130/92. Two positions were to be reduced to one. The actual decision-maker in the selection process was in a personal relationship with the affected employee who kept her position.

Henshaw's feelings, some of that injury was caused by the gossip and accusations to which I have referred to the extent that a reduction in the amount otherwise to be awarded is warranted. AIS is therefore ordered to compensate Ms Henshaw in the sum of \$1,000.

### **The circumstances of Mr Fuss' employment**

[37] Mr Fuss began his association with AIS in 2000, holding a number of contract, fixed term, part time and full time positions. The resignation of another member of the academic staff led to his appointment to a full time position in January 2007.

[38] Ms Henshaw has suggested that the appointment should not have been made. Had it not been made there would have been one less position to be made redundant and she could have retained her own position. There was little intrinsic merit in that proposition, but as I understand it the matter was raised because of the concerns about Ms Kedrinskaia's role in the redundancy process.

[39] Mr Fuss had recently been working under a series of part time fixed term arrangements when he was appointed to the full time position. This was possible in part because he was to teach some of the courses taught by the person who resigned, being courses he had previously taught at AIS. There might have been an alternative involving the redistribution of that person's courses among the existing staff members without creating a full time position for Mr Fuss, but I find that the option chosen was reasonably available to AIS. Further while AIS was aware redundancies may need to be considered, at the time the enrolment figures eventually acted on were not available so that the number and location of any redundancies could not be identified.

[40] Overall I find nothing inappropriate in the appointment viewed as at the time it was made. Not only that, the effect was to merge part time and a full time role into a single full time position. AIS was entitled to merge the associated requirements in that way.

[41] A number of allegations were made about Mr Fuss's qualifications and conduct. Many of the allegations concerning the latter were based on incomplete information and were not relevant to the redundancy process. They should not have

been made. Otherwise allegations concerning Mr Fuss' qualifications are addressed in the context of the application of the selection criteria.

[42] I find nothing arising out of this matter to indicate that Ms Henshaw's dismissal was unjustified or that she was disadvantaged in her employment by an unjustifiable action of her employer's.

### **The selection criteria**

#### 1. Were the criteria fair and reasonable

[43] The parties' employment agreement expressly incorporated AIS St Helens policies and rules as terms of employment. Part 4 of its Policies and Procedures Manual (the manual) covered human resources. Clause 4.1.11 (e) addressed selection criteria in part as follows

“Redundancy ...

Where the employer reviews its method of operation, or its structure, or where there has been a reduction in student numbers or demand for courses, the employer will notify the employees who could be affected by a potential reorganisation.

The employer will draw up a plan which includes key items such as:

....

. The proposed criteria to be used ... where there is more than one employee performing the same job (criteria will recognise the need to retain the necessary skills, knowledge and experience for the operational needs of AIS St Helens);

[44] The criteria were listed under the headings: qualifications; tertiary teaching experience; business experience in the area of teaching subjects; student evaluations; new course development experience; publications; research outputs (excluding PhD and Masters); professional development attended; and experience in teaching different subjects relating to AIS subjects. Each heading was broken down into further subheadings, with the maximum points available for each being identified.

[45] During discussion in evidence there was no real dispute that on their face the criteria were fair and reasonable. I accept that they were, and do not accept a submission that they breached cl 4.1.11(e) in that they failed to recognise the need to

retain the necessary skills, knowledge and experience for the operational needs of AIS. I do not accept the related submission that staff skills should have been assessed with reference to material such as performance appraisals.

[46] Nevertheless a number of other issues have been raised in respect of the application of the criteria, and are addressed in the rest of this section.

[47] Before turning to them, I address the submission that there was a failure to properly consult staff about the criteria and fairly take account of their comments. I do not accept that submission. The affected staff members were provided with the draft selection criteria, their feedback was sought and obtained in considerable detail, and it was responded to. Some changes were made as a result. AIS was entitled to draw the line where it did, and was not obliged to embark on what would have amounted to continuing argument about the content of the criteria.

[48] Although not deliberately so, some of the concerns amounted to concerns about the risk to individuals of a low score under particular criteria, or perceptions that others might score well, rather than bearing directly on the reasonableness of the criteria. Overall I agree with AIS' view that many of the issues raised amounted to disagreement with decisions that were fairly the province of the management. I do not accept that the relevant decisions were made without having followed a proper consultation process.

[49] In a related submission, Ms Henshaw says the criteria favoured Mr Fuss. However the relevant questions are whether the criteria were set from an objective point of view and in accordance with cl 4.1.11(e), without any attempt to favour a person or group. I am satisfied that was the case. Mr Fuss scored well under some of the criteria, and so did others. Indeed, although he was not one of the top scorers, Mr Fuss' total score was high enough to place him above a level where he was at risk of selection for redundancy.

[50] That is not in itself sufficient to warrant a finding that the criteria favoured Mr Fuss, even less that they were unfair as a result.

2. Were the criteria applied fairly and reasonably to Ms Henshaw?

[51] If Ms Henshaw's self assessment of 24 points had been confirmed, she would have achieved a higher ranking and probably would not have been made redundant.

[52] The differences between Ms Henshaw's self assessment and Dr Roberts' assessment of her lie in the following:

- a. a difference of 1 point for 'additional qualifications' in the form of a post graduate diploma;
- b. a difference of .5 point for having 'certificates in education or teaching';
- c. a change from Ms Henshaw's assessment of 4 points (over 10 years) to Dr Roberts' of 2 (4 – 6 years) for 'relevant business experience in the field in the area of the teaching subjects'; and
- d. a change from Ms Henshaw's assessment of 3 points (7 – 9 subjects) to Dr Roberts' of 2 (4 – 6 subjects) for 'experience in teaching different subjects related to AIS St Helens subjects'.

[53] The issue arising in (i) above concerned whether Ms Henshaw's post graduate diploma was subsumed in another qualification already scored, or whether it was a separate and discrete qualification attracting a full point. Dr Roberts conceded he had wrongly concluded the diploma was subsumed in another qualification. This meant Ms Henshaw should have received a full point, giving her an overall score of 20.5 points from him.

[54] If that were the only change in the final scoring then - subject to issues arising in respect of a tutor - Ms Henshaw would still have scored in the lowest four.

[55] The issue arising in (ii) above concerns Ms Henshaw's view that she was entitled to a full point for a tutor training certificate she received in 1995 from the Higher Education Research Office (HERO) at the University of Auckland. She was given .5 of a point because she was part of the way through a National Certificate in Adult Education and Teaching (NCAET) tutor training certificate at the University of Auckland.

[56] Dr Roberts did not accept that any point should be given for the HERO certificate. He considered it an in-house professional development certificate, and not an approved qualification.

[57] Ms Henshaw considered it unfair that a limit was placed on these qualifications for the purpose of scoring the available point. She also disagreed with the assessment of the HERO certificate. However I find that in the particular context of an assessment of the qualifications of academic staff, Dr Roberts was entitled to consider some qualifications did not merit weight. He was entitled to reach the conclusion he did in respect of the HERO certificate.

[58] The assessment of Ms Henshaw's relevant business experience in the field, arising out of (iii) above, was the subject of considerable disagreement.

[59] Before moving into her academic career Ms Henshaw had been employed as a supervisor in a supermarket chain, then for 13 years at New Zealand Post. After 5 years at New Zealand Post she was promoted to the position of senior clerk, and from time to time would be asked to 'act up' for up to two management levels as required. She took account of 7 years' experience as senior clerk in her self assessment. She also took account of the four years she had spent at AIS in the role of Deputy Head of the international business programme. The position incorporated administrative duties, so that from about 2002 to 2007 her teaching load was reduced from two courses per semester to one.

[60] Dr Roberts's assessment reflected his view of the relevance of Ms Henshaw's business experience related to her teaching subjects. Her current subjects included: management principles and business and social ethics; and applied management. Previously she had taught courses in organisational behaviour and human resource management. Dr Roberts considered that the role of senior clerk at New Zealand Post was not a permanent management role, and some moderation of points was required. For her part Ms Henshaw said the position was itself a first level management position. Dr Roberts also considered that some of the extra duties Ms Henshaw performed at AIS were essentially administrative rather than managerial. For those reasons he assessed her as entitled to 2 points. To qualify for the full 4 points, she would have needed more experience at a higher level.

[61] Dr Roberts was entitled to assess the level of management involved in previously-held positions, and allocate points accordingly. The question is whether he acted on wrong information in respect of the relevant positions. I do not believe he did. A further question of whether he treated the staff consistently under this criterion will be discussed in the next part of this section.

[62] Further to (iv) above, the difference between Ms Henshaw's self-assessment and Dr Roberts' assessment lay in Ms Henshaw's counting two subjects which Dr Roberts did not count.

[63] The first was organisational behaviour. Ms Henshaw tutored in organisational behaviour at Auckland University in the early 1990s, and also taught a Stage 2 course of that name at AIS St Helens some 15 years later. She was unable to locate details of the course she taught at Auckland University, but her belief that the course was 'different but related' to the course taught at St Helens centres on the proposition that there were significant advances in research and the development of the topic over that period.

[64] Dr Roberts disagreed with that approach. He cited an example within his own area of expertise, linguistics, which has also been subject to major changes in thinking during recent decades. He did not consider such changes meant a subject became a 'different but related' one. In principle and in the context of courses of the kind discussed here, that approach was reasonably open to him.

[65] The second subject was applied management. The issue was whether Ms Henshaw 'taught' the applied management course at AIS St Helens. Dr Roberts' approach was that since the course requirements were supervisory and did not involve teaching, the course would not be counted. Further, all lecturers were required to supervise applied management courses.

[66] Again I find Dr Roberts was entitled to assess the nature of the involvement in the course, and allocate points accordingly. He did not make an error of fact. Whether he treated the staff consistently under this criterion will also be discussed in the next part of this section.

3. Were the criteria applied consistently to the affected staff?

[67] Ms Henshaw raised the following inconsistencies in the application of the criteria:

- a. regarding relevant business experience in the field, Ms Henshaw queried whether Dr Roberts set the level of relevant experience too high, and said in particular that Mr Fuss' relevant experience was assessed at a lower standard than hers;
- b. credit for teaching applied management courses was assessed inconsistently; and
- c. the tutor was assessed at a different level from the rest of the staff.

(i) relevant business experience in the field

[68] Further to this criterion, Dr Roberts commented in evidence that the purpose was to recognise that an employee lecturing in human resource management, for example, would bring a wealth of directly relevant experience if the person had also spent (say) 10 years as a senior HR manager with a major corporate. I do not accept Ms Henshaw's view that such a statement set the level too high, rather I view it as an example of what would be a fair approach to assessments under that criterion. To support a finding that such an assessment was unfair or inconsistent, I would seek evidence that experience relevant to classes taught was assessed unfairly at a lower level for one employee than another in comparable circumstances.

[69] In that respect there was considerable discussion about lecturers' backgrounds, particularly that of Mr Fuss. For example Ms Henshaw believed that Mr Fuss was unfairly given credit for work such as acting as a food and beverage manager in Jamaica. She said this was a relatively low level management position.

[70] For his part Mr Fuss had listed a number of previously-held positions, some of which had management components of probably varying levels. Many were overseas positions, to which Dr Roberts attached weight because of the international scope of AIS' courses. I am not satisfied that Dr Roberts' overall view of the nature and relevance of the management component in Mr Fuss' previous positions was

inconsistent with the view he took of the level of Ms Henshaw's previous management experience – assessing both in the light of the needs of the courses taught.

(ii) inconsistent assessment of applied management course

[71] Ms Henshaw says credit for the applied management course was given to some staff but not others.

[72] Dr Roberts maintained that where courses with that title required only supervision they were disallowed. Mr Fuss, for example, was included in those who claimed credit for the course but whose claim was disallowed. Two staff members who sought it were given a credit. One was the tutor, who was given credit because supervision of the applied management course was not required as part of her duties, while the other was given credit for the extra task of acting as co-ordinator of the course.

[73] I find the explanation in respect of the latter to be adequate. I now turn to wider aspects of the assessment of the tutor.

(iii) the assessment of the tutor

[74] Ms Henshaw had particular concerns about the tutor's assessment. The tutor's raw score placed her in the bottom four. If the raw score were undisturbed that, coupled with Ms Henshaw's corrected score of 20.5, would mean the tutor should have been made redundant rather than Ms Henshaw.

[75] There are two aspects to the assessment of the tutor. The first and most important concerns the extent to which the tutor was assessed differently from the lecturers by virtue of the requirements of her position, while the second concerns allegations of inconsistent treatment that are not explained with reference to the different nature of the position.

[76] The tutor's raw score was arrived at against a possible total of 28 points. The score was scaled to match the total of 35 available to the rest of the affected staff,

giving a final score of 22.5. The tutor's assessment sheet indicates she was not scored under the criteria of business experience in the field in the area of teaching subjects, new course development experience, or significant external involvement enhancing the standing of AIS (for which up to 7 points were available). In that respect Dr Roberts's statement identifying the criteria not scored may have been in error.

[77] As for other examples of apparently inconsistent assessments AIS says were made with reference to the nature of the tutor's position, I have already noted why the tutor received credit for the applied management course.

[78] In addition Ms Henshaw believed the tutor should have been given points only for teaching degree level courses, not for foundation level courses which prepared students for entry to degree courses. Dr Roberts said the tutor was appointed because she had the skills and experience to help such students, which was considered a 'decided plus'. She scored points accordingly. That is reasonable.

[79] Of the alleged inconsistencies not explained with reference to the nature of the position, Ms Henshaw said the tutor was permitted to claim for each of three courses of organisational management she taught at AIS (rather than only one) on the ground that the courses were taught at different levels. Dr Roberts said there was no inconsistency as that was the approach over all subjects.

[80] Finally Ms Henshaw said the tutor's length of service was 5 years. In fact the tutor's fifth anniversary would have been on 28 May 2007. Dr Roberts said he made a 'line call' and scored her in the 5+ years' of service category rather than 3 – 5 years, which attracted one less point. If other staff members had been treated differently in similar circumstances I would have found merit in this concern, but otherwise Dr Roberts made a call he was entitled to make.

[81] I find no inconsistency arises out of the last two examples, and that the key question is whether it was fair to apply some of the criteria differently to the tutor with reference to the nature of her position.

[82] It may not be appropriate to create a set of criteria ostensibly to apply to all academic staff when the nature of a position such as tutor meant the holder - regardless of the attributes of the individual concerned - would be unable to score under some of the criteria. Such an inherent disadvantage may mean separate criteria should have been developed for a tutor's position. Alternatively and in fairness to the lecturers the exclusion of the tutor from some of the criteria, by virtue of the nature of the position and not because of the attributes of the incumbent, should have been consulted on and advised in advance.

[83] Accordingly while I accept that the tutor was judged with reference to the expectations of a tutor, there might have been a better and more transparent way of dealing with tutors' positions in principle.

[84] At the same time there was a need for a balancing exercise so that the tutor was not placed unfairly in an impossible position, while also not unfairly disadvantaging the lecturers. There was an apparent inconsistency in that different standards were applied to the tutor under some criteria, but in the light of the necessary balancing exercise the difference was adequately explained and I do not consider the result was unfair to Ms Henshaw.

#### 4. Conclusion regarding the selection criteria

[85] I have been assisted by a full discussion of the law regarding selection criteria in Brooker's Personal Grievances at 6.8.10 and following.

[86] To summarise what is said about selection criteria in general:

- a. in a genuine redundancy situation the employer is entitled to select employees for redundancy;
- b. the selection criteria must be properly formulated and applied according to the standard of a reasonable employer acting fairly and in good faith;
- c. the selection criteria should be disclosed;
- d. in making the selection the employer is entitled to assess its employees' skills and attributes;

- e. selection decisions should not be made with reference to irrelevant or incorrect information;
- (vi) failure to adhere to any contractual criteria, or to apply them correctly, will probably render the process unfair.

[87] With reference to those steps I find nothing arising out of the setting or application of the selection criteria to indicate that Ms Henshaw's dismissal was unjustified or that she was disadvantaged in her employment by an unjustifiable action of her employer's.

### **Independence of the moderator**

[88] When he was approached to act as moderator, Nitin Seth was currently engaged to conduct a quality review of the AIS MBA programme. He had been a director and professor of an MBA programme at a university in India, and possessed a doctorate and many years' business experience. AIS considered him suitable because of his background and experience and because he had no personal knowledge of the staff involved.

[89] Mr Seth's independence was challenged in that it was suggested he had a vested interest in the outcome of the evaluations. He had enquired about employment opportunities in 2006, and was appointed to the MBA programme 6 months after the redundancies. The challenge amounted to a serious accusation impugning Mr Seth's integrity. It was speculation based on the two matters I have mentioned. It should not have been made.

[90] It was also suggested Mr Seth had personal knowledge of Mr Fuss. The evidence in support was largely assumption and speculation. Mr Fuss addressed the lack of foundation for the speculation and his evidence was that the two men did not know each other. I accept that evidence.

[91] There was no merit in the challenge to Mr Seth's independence. I do not accept there was anything inappropriate or unfair in the appointment of Mr Seth as moderator.

**Whether pool of affected staff members should have been limited**

[92] Ms Henshaw says the pool of potentially redundant employees should have been identified primarily if not entirely as staff employed in the arts programme, because that programme was the one principally affected by the dropping student numbers. Positions in that programme, rather than positions of staff in the international business programme, were to a significant degree the potentially surplus positions.

[93] The same argument was raised in the international business programme staff responses to the proposed selection criteria. The answer at the time was that a number of papers were taught in the international business programme - and also related to the arts and tourism management programmes - including certain writing and communications courses and ethics. In evidence the answer was amplified as I have described.

[94] In further support it was submitted that AIS' HR policies required AIS to select only between employees 'performing the same job'. In that respect attention was drawn to clause 4.1.11 (e). It was submitted that 'the same job' did not extend as far as 'lecturer' in the generic sense, rather it meant here 'lecturer in the arts programme'. I do not accept that clause 4.1.11 (e) can be read down that way, particularly where there is crossover in courses of the kind described.

[95] Overall the relevant question is whether AIS made a decision on the matter which was reasonably open to it, on genuine grounds. I find on the facts that it did.

**Whether voluntary redundancies should have been sought**

[96] The manual was silent on voluntary redundancies. In saying voluntary redundancies should have been sought, Ms Henshaw relied principally on the letter of 27 September 2006.

[97] If the letter created an expectation that voluntary redundancies would be sought, that is unfortunate. Although the letter identified a possible path in the light of the circumstances known at the time, there was no binding obligation on AIS to proceed accordingly. It was entitled not to do so.

[98] For these reasons I do not consider there was an unjustified failure to seek voluntary redundancies.

### **Additional concerns about the procedure used in implementing the redundancy**

#### 1. Failure to discuss Ms Henshaw's assessment with her prior to termination

[99] The staff had asked in their document dated 15 April for the opportunity both to complete a self assessment form and view the assessment completed by management. If there was a difference they wanted to have the matter clarified. The response of 18 April did not comment on the request as it related to discussion of any differences in the assessments. Such a request should at least have been granted to those who had scored lowest and were selected for redundancy. This includes Ms Henshaw.

[100] I do not believe the conversation on the morning of 27 April went far enough, and nor was it more than a request for further details in any event. Indeed the conclusions Dr Roberts reached as a result of that call were material to the outcome. Ms Henshaw should have been warned of that possibility and in that context had an opportunity to discuss the matters about which she was asked, as well the other differences raised, before her score was confirmed.

#### 2. Failure to give opportunity to obtain representative

[101] It was acknowledged that there was no contractual requirement to offer an opportunity to obtain representation. The submission that such opportunity should have been offered centred on propositions that representation would have given Ms Henshaw a sense of comfort in dealing with the process, and might have assisted in persuading AIS to accept some of the staff submissions regarding the content of the selection criteria.

[102] However the staff of the international business programme were actively involved in the consultation process prior to the assessments being made, obviously acted as a group and supported each other, did not raise a wish or need for representation at the time, and included lecturers in human resources in their number.

### 3. Conclusion

[103] I consider the failure to consult Ms Henshaw about the differences between her scores and Dr Roberts' was a flaw in the redundancy procedure, although the outcome would have been the same had it not occurred. The consultation process has been challenged in this respect, and I find the challenge has merit. The failure to discuss the differences in scoring in particular prior to implementing the redundancy was unjustified. The failure disadvantaged Ms Henshaw in that she did not receive an opportunity to reply. There is a personal grievance on this ground.

[104] I do not accept there was any unfairness or any unjustified action on AIS' part in respect of the opportunity to obtain a representative.

[105] Regarding remedies, no loss of remuneration flowed from the disadvantage grievance found here. The appropriate remedy is an order for compensation for injury to Ms Henshaw's feelings caused by the grievance.

[106] Because of the limited ground on which it rests, such a grievance would in general attract a modest award. AIS is therefore ordered to compensate Ms Henshaw in the sum of \$3,000.

#### **Failure to offer vacant position after redundancy**

[107] The manual provided at cl 4.1.12 that:

“In the situation of redundancy, a permanent employee whose position was made redundant is eligible to receive priority in re-employment for a period of six months from the date they receive written notification of redundancy. ...

An employee who has been made redundant will be informed of the new vacancy in their area of expertise before the position is publicly advertised. Candidates must meet the minimum qualifications and experience requirements of the position. They will be also eligible to apply for any other positions advertised by the institute on an equal basis with other applicants. ...”

[108] The letter of termination of employment dated 27 April informed Ms Henshaw:

“We will place your name at the top of the list for any relieving/fixed term or any other work available in your area of expertise.”

[109] By message dated 23 May 2007 Ms Henshaw was advised of a vacancy for a part time fixed term tutor’s position teaching business courses to IT students. The message asked Ms Henshaw to advise of her interest in undertaking that work. The next day Ms Henshaw replied through her solicitor seeking further details of the position, and saying her ‘take up’ of it was dependent on satisfactory responses to her queries about the terms and conditions being offered. The wording of the 27 April letter meant she believed her name was at the top of the list for this vacancy, and she responded accordingly.

[110] The same message was sent to all four employees made redundant. One other of them also sought further information promptly in response. He, too, understood from similar wording in his letter of termination of employment that his name was at the top of the list for the vacancy.

[111] The attention of both was drawn to the relevant provision in the manual. Both were told they were considered to be applicants for the position. By message dated 31 May 2007 the other employee, who was considered a better candidate, was formally offered the position. He accepted the offer.

[112] When a new or vacant position attracts more than one applicant with preferential rights, the employer is entitled to make its selection on the basis of which applicant was more suitable.<sup>2</sup> I find no breach of an obligation to Ms Henshaw and no unjustified action on the part of AIS in this respect.

### **Conclusion regarding justification for dismissal**

[113] The applicable law is set out in the decision of the Employment Court in **Simpsons Farms Limited v Aberhart**<sup>3</sup>. There the court summarised earlier case law regarding an employer’s obligation to consult with an employee who may be affected by a redundancy, as well as discussing the effect on redundancy dismissals of s 103A of the Employment Relations Act 2000. It pointed out that s 4(1A) of the Act –

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<sup>2</sup> **Priest v Fletcher Challenge Limited** [1999] 2 ERNZ 395

<sup>3</sup> [2006] ERNZ 825

which detailed aspects of the statutory obligation to deal in good faith – included requirements that an employer proposing to implement redundancies provide to the affected employees access to information about the proposal, and an opportunity to comment on it, before the decision is made. The court concluded:

“[65] Following the new s 103A, the Authority or the Court must consider on an objective basis whether the decisions made by the employer, and the employer’s manner of making those decisions, were what a fair and reasonable employer would have done in all the circumstances at the relevant time. The statutory obligations of good faith dealing and, in particular, those of s 4(1A)(c) inform the decision under s 103A about how the employer acted. A fair and reasonable employer must, if challenged, be able to establish that he or she has complied with the statutory obligations of good faith dealing in s 4 including as to consultation because a fair and reasonable employer will comply with the law.”<sup>4</sup>

[114] The matters set out and discussed in the foregoing sections of this determination are relevant to whether AIS’ actions were those a fair and reasonable employer would have taken, and whether it had complied with its obligation of good faith.

[115] I have found that certain actions of AIS’ were unjustified and disadvantaged Ms Henshaw in her employment. However I do not find those actions, whether separately or cumulatively, are sufficient to render Ms Henshaw’s dismissal unjustified. There were a number of other actions I have not found to be unjustified, for the reasons set out.

[116] Accordingly I find Ms Henshaw’s dismissal was justified.

### **Summary of orders**

[117] AIS is ordered to pay compensation under s 123(1)(c)(i) of the Employment Relations Act to Ms Henshaw as follows:

1. \$1,000 in respect of perceived bias and conflict of interest regarding Ms Kedrinskaia’s role; and

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<sup>4</sup> P 842

2. \$3,000 in respect of the failure to consult about the outcome of the scoring process.

### **Costs**

[118] Costs are reserved. I note advice that Ms Henshaw is in receipt of a grant of legal aid.

[119] The parties are invited to reach agreement on costs. If they are unable to do so any party seeking costs shall have 28 days from the date of this determination in which to file and serve memoranda on the matter. The other party shall have a further 14 days in which to file and serve a reply.

R A Monaghan

Member of the Employment Relations Authority