j

IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2013] NZERA Auckland 256
5393351

	BETWEEN	TERTIARY EDUCATION UNION Applicant
	AND	VICE-CHANCELLOR, UNIVERSITY OF AUCKLAND Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Simon Mitchell, Counsel for Applicant Phillipa Muir, Counsel for Respondent
Investigation Meeting:	6 June 2013
Submissions received:	6 June 2013 from Applicant and Respondent
Determination:	18 June 2013

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, the Tertiary Education Union (TEU), has applied to the Authority to resolve a dispute concerning the interpretation and application of clause 2 of the Academic Staff Collective Agreement which came into force on 9 December 2011 and continues until 30 June 2013 (the Collective Agreement).

[2] Specifically the TEU requires the Authority to determine at what point the obligation arose to inform the TEU of an intention to review the Academic Grades, Standards and Criteria policy (the Policy) in accordance with clause 2.6 (a) of the collective Agreement, and what clauses 2.4 to 2.6 of the Collective Agreement require of the Respondent, the Vice-Chancellor of the University of Auckland (the Vice-Chancellor).

[3] The Vice-Chancellor agrees that the Authority should issue a determination as to the correct interpretation and application of clauses 2.4 to 2.6 of the Collective Agreement.

Issues

[4] The issue for determination is the correct interpretation and application of clauses 2.4 to 2.6 of the Collective Agreement.

Background Facts

[5] In his position as the Vice-Chancellor of the University of Auckland (the University), the Vice-Chancellor is the employer of all University employees. The University employees consist of both academic and management/professional employees totalling approximately 5,911, of which academic employees constitute some 51% and management/professional employees constitute 49%. The TEU represents a proportion of the academic employees.

[6] Employees' terms and conditions of employment are set out in either individual employment agreements, or in collective agreements for those employees who are union members.

[7] There are in excess of 70 policies which relate to the University's human resources policy, and prior to the Collective Agreement being ratified, the large majority of these were set out in the University's Policy framework. However 5 policies (research and study leave, outside activities undertaken by the academic staff, academic grades standards and criteria, discipline procedures for academic staff, and eye tests provision) were incorporated into the Collective Agreement.

[8] Clause 2 of the Collective Agreement entitled 'MUTUAL RESPONSIBILITIES' set out at clauses 2.4 to 2.8 the role of the TEU in regard to academic governance of the University in respect of 3 of the 5 policies *(*research and study leave, outside activities undertaken by academic staff, and academic grades, standards and criteria):

> *2.4 The employer recognises that employees covered by this agreement are entitled to participate in the academic governance of the University as provided in this clause, both individually and collectively as members of the union, acknowledging that the University is governed by its Council.*
>
> *2.5 The employer recognises that such collective participation is particularly important in relation to academic matters, complementary to the role and responsibility of the Senate for academic matters.*

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

(a) The employer shall inform the union of its intention to review such policies and enter into discussions regarding the appropriate conduct of the review;

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

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

2.7 The union shall appoint two members (one academic and one professional staff) to the Staff Advisory Committee.

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

Academic Standards and Criteria policy

[9] The Vice-Chancellor said that he had been concerned upon his appointment as Vice-Chancellor on 1 January 2005 that the Policy was complex, confusing, and did not properly address performance standards and promotion criteria in an appropriate way.

[10] Accordingly in 2007 the Vice-Chancellor said that he had provided his senior management team with a document for discussion concerning the performance standards for

promotion and appointment, and in May 2008 provided a further document, *"Academic performance standards and remuneration"* to the Committee of Vice-Chancellor, Deputies and Deans (VCDD).

[11] In March 2011 in an email to all employees, the Vice-Chancellor said he had confirmed his view that the Policy needed to be improved.

Bargaining

[12] The 2009 Collective Agreement between the University and the TEU expired on 30 June 2010, and bargaining had been initiated between the parties on 14 May 2010 and commenced on 23 August 2010.

[13] Despite several bargaining meetings, no settlement had been reached, and as the bargaining had become protracted, the parties had agreed to attend facilitation with the Authority.

[14] The Vice-Chancellor said that during the facilitation process, there had been significant discussion about the 5 policies referred to in paragraph [7] above, however there had been little discussion about the proposed clause 2.6 which had been tabled by the TEU and which set out the procedure to be followed in respect of 3 of these policies.

[15] The Vice-Chancellor said that the main focus of discussion had been on clause 2.4 and the insertion of the word 'academic' before 'governance' to clarify that the TEU was to be involved only in collective participation of the "*academic governance"* of the University, and not all governance.

[16] The Collective Agreement had been signed by the Vice-Chancellor on 31 October 2011 and by the TEU on 2 November 2011.

[17] Dr Paul Taillon, Co-President (Academic) of the TEU, said that following the signing of the Collective Agreement several steps had been taken in relation to the Policy. These steps, which are not disputed, were:

- On 18 November 2011 the Vice-Chancellor held email communication with Associate Professor Caroline Daley and Professor John Morrow about the review of the Policy and had provided them with 'version 21' of a new Policy;

- The latest version of the Policy document was provided to the VCDD on 15 December 2011 for sign off;

- Thereafter the Vice-Chancellor provided a version of the Policy to eight partner Universities for comment, and to Mr Andrew Phipps of the University's Human Resources department also for comment;

- On 12 April 2012 the Vice Chancellor received input on the Policy from Mr Phipps, Professor Morrow and Professor Jane Harding;

- On 9 May 2012 the Vice-Chancellor discussed a proposed timeline for consultation on the Policy with Mr Phipps and Ms Kath Clarke of the University's Human Resources department which included:

    - The TEU was to be informally informed on 9 July 2012 that the draft proposal was to be released on 11 July 2012;

    - On 11 July 2012 the Vice-Chancellor would announce a 2 month consultation period;

    - On that same day the TEU would be sent a letter inviting discussion on the draft proposal; and

    - There would then be a meeting with the TEU leadership about the draft proposal.

- On 11 July 2011 the Vice-Chancellor received feedback on the proposed policy from Professor Greg Whittred, and on 13 July from Associate Professor Caroline Daley;

- Ms Clarke prepared a draft report on the feedback received from the eight partner Universities and provided it to the Vice-Chancellor, who made alterations and sent it back to Ms Clarke for her to provide officially on 18 July 2012;

- Professor Morrow made further changes to detailed aspects of the policy on 23 July 2012;

- On 23 July 2012 the documents were provided by the Vice-Chancellor to the VCDD, which reviewed the documents, and sought and obtained changes;

- On 31 July 2012 the Vice-Chancellor prepared a comprehensive presentation to be made to employees;

[18] Professor Graeme Aitken, a member of the VCDD, said that any review of the Policy needed a shared commitment of the Deans to a formal review.

[19] Professor Aitken explained that the initial draft for the Policy review went through multiple iterations and that it was only after an extended process of comment and refinement that the Deans agreed, on 26 July 2012, that there was a viable Policy review proposal. Professor Aitken agreed that the process undertaken by the VCDD was carried out in a collegial manner and had concluded in a consensus to move forward.

[20] Dr Taillon said that on 3 August 2012 Ms Clarke had informed him informally that the University wanted to consult with the TEU about proposed changes to the Policy.

[21] On 10 August 2012 the Vice-Chancellor wrote to Dr Taillon and referred to the TEU view that a review of the Policy should begin with a *de novo* analysis of the current policy, and stated: "*... my preference is for the review to seek feedback on and consider a proposal that I have developed in collaboration with the Deans".*

[22] Dr Taillon confirmed that Oakley Moran, the TEU lawyers had written to the Vice-Chancellor on 20 August 2012 setting out the TEU concerns that the Vice-Chancellor had acted in breach of clause 2 of the collective Agreement, and there had been a response from the Vice-Chancellor in which he had denied a breach of the Collective Agreement.

[23] On 28 August 2012 the TEU filed a Statement of Problem with the Authority.

[24] The Vice-Chancellor said he had offered to extend the consultation period of the Policy review beyond the initial proposed timeline of 19 October 2012 but as the TEU had made it clear that it was not prepared to participate in the review process, he had decided to continue the Policy review and start the consultation process.

[25] The review commenced on 22 August 2012 and had been chaired by Professor John Morrow. The review closed on 2 November 2012 without any participation by the TEU in the process.

Determination

[26] The parties have different interpretations of clause 2.6 of the Collective Agreement. Mr Mitchell for the TEU submits that the Vice-Chancellor breached clause 2.6 (a) of the Collective Agreement by failing to inform the TEU of the intention to review at the appropriate time, and consequently the review has proceeded without the TEU's participation as provided for in clause 2.6 (b) and (c) of the Collective Agreement.

[27] Ms Muir for the Vice-Chancellor submits that a review may appropriately be commenced once there is a proposal for consideration in respect of one of the relevant

policies. Accordingly the Vice-Chancellor acted in accordance with clause 2.6(a) of the Collective Agreement by informing the TEU on 6 August 2012 of his intention to review the Policy and with clauses 2.6 (b) and (c) of the Collective Agreement by entering into discussions with the TEU on how the review should be conducted before it commenced on 22 August 2012.

[28] The starting point for a determination of the correct interpretation of clause 2 is with the law.

The Law

[29] In the recent case of *NZ Amalgamated Engineering, Printing and Manufacturing Union* v *Amcor Packaging (New Zealand) Limited*[1] Judge Ford introduced a summary of the law regarding the interpretation of collective agreements as follows:[2]

> *The leading authority on contract interpretation in this country is the decision of the Supreme Court in Vector Gas Ltd v Bay of Plenty Energy Ltd*[3] *That decision related to the construction of a commercial contract but the Court of Appeal in Silver Fern Farms Ltd v New Zealand Meat Workers and Related Trade Unions Inc*[4] *made it clear that the principles of interpretation prescribed in Vector had equal application to employment agreements.*[5] *The court is required to apply a principled approach to the interpretation of employment agreements and disputes as to meanings must be determined objectively. Vector highlighted the significance of the awareness of context as a necessary ingredient in ascertaining the meaning of contractual words emphasising commercial substance and purpose over semantics and the syntactical analysis of words.*

[30] In *NZ Meat Workers & Related Trades Union Incorporated v Silver Fern Farms Ltd (formerly PPCS Ltd)*[6]*("Silver Fern Farms")* Judge Shaw referred to the principles of construction in interpreting collective agreements as having been summarised by the Employment Court in *New Zealand Tramways and Public Transport Union Inc v Transportation Auckland Corporation Ltd*[7]. The Employment Court in that case had observed that:[8]

> *The starting point is to examine the words used to see whether they are clear and unambiguous and to construe them according to their*

---

[1] [2011] NZEmpC 135
[2] Ibid at para 12]
[3] [2010] NZSC 5, [2010] 2 NZLR 444
[4] [2010] NZCA 317
[5] See [36]-[37]
[6] [2009] ERNZ 149
[7] [2006] ERNZ 1005
[8] Ibid at para [16]

> *ordinary meaning. Consideration must be given to the whole of the contract. The circumstances of entering into the transaction may be taken into account, not to contradict or vary the written agreement, but to understand the setting in which it was made and to construe it against that factual background having regard also to the genesis and, objectively, the aim of the transaction …*

[31] In *Silver Fern Farms* Judge Shaw had also referred to the Court of Appeal decision in *Pyne Gould Guiness Ltd v Montgomery Watson (NZ) Ltd*[9] in which the Court of Appeal had referred to the use of the surrounding circumstances to ensure the correctness of the natural meaning of the words as 'cross-checking'.

[32] Judge Shaw had further approved of the view of Judge Colgan (as he then was) expressed in *ASTE v Chief Executive of Bay of Plenty Polytechnic*[10] that the interpretation of a collective agreement should not be narrowly literal but should accord with business common sense, stating at para [23] that:

> *The interpretation, rather than being based simply on dictionary meanings and grammar, should fulfil the purpose of the contract. Even if the drafting is inept, the Court should be able to give effect to the underlying intent. Moreover, if a literal interpretation gives rise to nonsense in practice, the Court should endeavour to find a more liberal interpretation which satisfies business common sense and fulfils the parties' purpose.*

[33] The starting pointing in analysing the dispute between the Vice-Chancellor and the TEU regarding the meaning of the clauses concerning with, in this instance, the Policy, is to examine the words of the relevant clauses to see whether they are clear and unambiguous.

Clause 2.6 (a) of the Collective Agreement

(i) Intention

[34] Clause 6 of the Collective Agreement states: "*…the employer shall comply with the following participatory processes …".* This is a mandatory instruction and applies to the succeeding clauses 2.6 (a) to (c).

[35] Clause 2.6 (a) of the Collective Agreement states: "*The employer shall inform the union of its intention to review such policies and enter into discussions regarding the appropriate conduct of the review".*

---

[9] [2001] NZAR 789 (CA)
[10] [2002] 1 ERNZ 491 at 500

[36] The TEU view of the clause as set out in the letter from Oakley Moran dated 20 August 2012 is that the words of clause 2.6 (a) placed an obligation on the Vice-Chancellor to inform the TEU of his intention to review the policy and that this obligation arose before the Vice-Chancellor commenced the review.

[37] Ms Muir submits for the Vice-Chancellor that on an assessment of the plain meaning of the words of clause 2.6 (a), the focus is on the process to be followed in a review, and that the words do not contemplate discussion or agreement about the content of the Vice-Chancellor's proposal that is to form the basis of a review.

[38] The Online Oxford Dictionary defines 'Intention' as: "*a thing intended; an aim or plan".*

[39] I find that a plain meaning of the words: "*its intention to review such policies"* is that the Vice-Chancellor will inform the TEU of his aim or plan to review the Policy, and that such an obligation arises prior to the review commencing. Once the intention to review is announced, clauses 2.6 (b) and (c), which set out the procedure to be followed during the review, become activated.

[40] However in determining the interpretation of clause 2.6 of the Collective Agreement, I find that whilst it is clear that the wording of clause 2.6 (a) places an obligation on the Vice-Chancellor to inform the TEU of his intention to review the Policy prior to commencing the review, it is fundamental to decide what the word 'review' means within the contractual context in order to determine at what point the obligation arises.

(ii) Review

[41] Ms Muir submits that the Authority must take into consideration the Vice-Chancellor's past custom and practice as evidence of the parties' objective intention when interpreting the clause and its application by the Vice-Chancellor.

[42] On this basis a review does not commence until there have been some preliminary steps taken prior to the formation of a policy proposal, which policy proposal would then form the basis for the review. Thus in this instance a review commences once there is a draft policy proposal to be reviewed, an approach which is consistent with the University Policy framework.

[43] Ms Muir further submits that there is no requirement that the review commence with a *de novo* analysis of the policy at hand, and that it would be impracticable to interpret

the words as meaning that notification of an intent to review must be given before there has been any preliminary analysis or consideration of the policy document to determine whether or not a review should be undertaken.

[44] Mr Mitchell submits that the obligation placed on the Vice-Chancellor in accordance with clause 2.6 of the Collective Agreement is not merely to give the TEU the opportunity to be consulted about the Policy proposal, but to provide the opportunity to be fully involved in the entire conduct of the review of the existing policy.

[45] Mr Mitchell further submits that if the obligation was simply to comment on the Policy proposal, and consider other submissions, there would be no need for the provision at clause 2.6 (b) which provides the TEU representative with the right to obtain advice from members during the course of the review, nor would there be an obligation to act collegially and cooperatively as is set out at clause 2.6(c) of the Collective Agreement.

[46] In accordance with the legal precedents, I consider that what is required for a proper interpretation of clause 2.6 (a) to (c) of the Collective Agreement and the meaning of 'review' is reference to the purposes of the Collective Agreement and the other clauses around it, and accordingly I now address the surrounding circumstances and other clauses of the Collective Agreement as an aid to interpretation.

(iii) Contractual context

[47] Examining clause 2 of the Collective Agreement as a whole, I note the provision in clause 2.4 for the TEU members to participate in the academic governance of the University:

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

[48] This provision highlights the fact that academic employees have a unique role to play in respect to the University as compared to employees in other institutions in that they form part of the governance process, specifically academic governance.

[49] The Collective Agreement further emphasises and clarifies this role at clause 2.5 which states:

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

[50] Clause 2.6 of the Collective Agreement outlines the procedure to be followed in connection with the revision of 3 policies, these being: "*research and study leave, outside activities undertaken by academic staff, and academic grades, standards and criteria*."

[51] Clause 2.8 of the Collective Agreement refers to employees obligations to comply with all the Universities policies: " *as amended by the employer from time to time either in accordance with provisions 2.4 to 2.6 above, or, in other cases, following appropriate consultation with and on reasonable notice to the union and employees."*

[52] Reading the clause 2 sub-sections as a whole I find that there are two distinct sets of policies referred to, those identified in clause 2.6, and 'other' policies as referred to in clause 2.8 of the Collective Agreement.

[53] In regard to the 'other' policies, I find that clause 2.8 of the Collective Agreement outlines a requirement for consultation, and I accept that this would accord with the usual University process of having a draft policy proposal which would form a basis for consultation and discussion with amendment to the original policy taking place as a result of such consultation.

[54] Prior to reaching the point of a draft policy or proposal for consultation and discussion I consider that a process of informal review of the original policy would have taken place, with revisions being made at various stages.

[55] Accepting the Vice-Chancellor's submission that in relation to clause 2.6 of the Collective Agreement a review would not commence until a proposal had been provided, would in my view not accord with plain meaning of 'review' as defined in the Shorter Oxford English Dictionary (Sixth Edition):

> *View, inspect or examine a second time or again. Formerly also, see again. Submit to review. Look over or through (a book etc.) in order to correct or improve; revise.*

[56] There is no differential made in clause 2.6 between an 'informal' and a 'formal' review, and it is clear that from 18 November 2011 onwards there had been a process of review as defined above undertaken by various persons and entities, a number of these steps

taking place after the Collective Agreement had been signed by the parties, and some taking place after 9 December 2011 when the Collective Agreement was in force.

[57] I find the process undertaken by the VCDD, in addition to the 'extended process of comment and refinement' referred to by Professor Aitken, to have been all part of the review process. I further note that the participation of the VCDD in that process was characterised by the VCDD making 'multiple iterations' and that it agreed by Professor Aitken to have been collegial.

[58] Whilst I acknowledge that in respect of the 3 policies identified in clause 2.6 of the Collective Agreement, clauses 2.6 (b) and (c) provide the TEU with significant participation rights in respect of the conduct of a review, I do not consider that these rights are activated only when a 'formal' review is intended.

[59] There is no differential made in clause 2.6 of the Collective Agreement between 'formal' and 'informal' reviews which I therefore find to encompass both formal and informal reviews of a policy, thus that these rights are initiated when informed of the "*intention to review"*.

[60] Further clause 2.6 (c) of the Collective Agreement states that the participation of the TEU representatives in any review is to be 'collegial and cooperative'. These words I consider to accord more with the process undertaken by the VCDD as described by Professor Aitken when considering the draft Policy proposal put forward by the Vice-Chancellor, than to the process of consultation as referred to in clause 2.8 of the Collective Agreement.

[61] I determine that the correct interpretation of clause 2.8 of the Collective Agreement is that the Vice-Chancellor is obliged to consult with the TEU on a change to 'other' policies excluding the 3 policies identified in clause 2.6. Thus clause 2.8 provides the TEU with only an opportunity for consultation on a policy which had been reviewed and redrafted without its input.

[62] In respect of the 3 policies as set out in clause 2.6 of the Collective Agreement, I determine that the Vice-Chancellor is obliged to inform the TEU of his intention to review such policies and that the Policy review encompasses the formation of the draft Policy proposal. Once the TEU have been informed of the intention to review, the Vice-Chancellor and the TEU are obligated to follow the process for the Policy review as set out in clauses 2.6 (b) and (c) of the Collective Agreement.

Business Common Sense

[63] The Vice-Chancellor explained that he had from the outset of his employment an 'aim' of redefining the Policy to make it less complex and confusing and had taken preliminary steps in this direction. On this basis on the interpretation as determined above, he would have been in breach of clause 2.6 of the Collective Agreement from the instant he entered into it.

[64] I do not consider that this would be the case. Examining the matter from a business common sense perspective, the Collective Agreement was binding on the Vice-Chancellor from the point at which it came into force. Any actions taken in accordance with a pre-existing intention prior to this date would not breach the Collective Agreement. However from that date onwards I consider that the obligation to comply with the agreed terms became binding.

Costs

[65] Costs are reserved. I accept that this was a genuine dispute about the interpretation, application or operation of the provisions of the Collective Agreement and I am not persuaded that this is a matter in which costs should be awarded.

[66] However in the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, submissions may be filed by the parties within 28 days of the date of this determination

Eleanor Robinson
Member of the Employment Relations Authority