IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

WA 1/10
File Number: 5281889

	BETWEEN	Martin Wrigley First Applicant
	AND	Terry Kelly Second Applicant
	AND	Vice-Chancellor Massey University Respondent

Member of Authority:	Denis Asher
Representatives:	Peter Cranney for the applicants Peter Chemis and Andrea Pazin for the respondent
Investigation Meeting	Wellington, Monday 23 November 2009
Submissions Received	25 November 2009
Determination:	6 January 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Is the University in breach of s. 4 (1A) of the Employment Relations Act 2000 (the Act) by withholding certain information relating to its decision to select others for continued employment in preference to the applicants?

Investigation

[2] During a telephone conference on 16 October 2009 the parties agreed to an investigation in Wellington on 23 November 2009 as well as timelines for providing the Authority with an agreed statement of facts and bundle of documents, and submissions.

[3] While the parties agreed with the Authority's observation that their problem was something of a test case they declined the suggestion it be referred to the Employment Court notwithstanding their acceptance there was every likelihood of a challenge to the court; given the parties' position I was satisfied that mediation would not contribute constructively to resolving this problem: s. 159 of the Employment Relations Act 2000 (the Act) applied.

[4] At the Authority's investigation on 23 November 2009 the applicants' counsel, Mr Peter Cranney, confirmed that the original remedy sought in his clients' statement of problem – an order preventing dismissal or notice of dismissal until information sought had been provided and commented on – had been effectively overtaken. As is made clear in their submissions dated 23 November, the applicants seek a determination that s. 4 (1A) of the Act was breached.

Agreed Statement of Facts

[5] I now adopt and adapt the parties' agreed statement of facts.

[6] The University recently underwent a restructure: the applicants' existing positions were made redundant and they were unsuccessful candidates for new positions arising out of the restructuring. As a result their employment with the University came to an end.

[7] In making appointments to the two new positions, the University relied on two selection panels. Prior to conducting interviews the selection panels met to discuss the selection process. At these meeting panel members were given:

(a) A memorandum from the senior human resources advisor about the selection process;

(b) A list of the candidates and interview times;

(c) A copy of the relevant job description;

(d) A copy of the CVs and cover letters received from each candidate;

(e) An interview sheet to complete for each candidate; and

(f) An individual assessment sheet for each candidate.

[8] Questions were allocated to each of the panel members.

[9] The interviews were scheduled for an hour and for the most part were completed in around that time.

[10] During the interviews selection panel members asked each candidate the questions on the interview sheet ([7] (e) above).

[11] Each member of the selection panel scored the candidates responses to each question on a rating of 0 to 5 as set out on the interview sheet. Panel members could and did record comments about the candidate and their responses on the interview sheet.

[12] After all of the interviews for each position had been conducted the panel members held a discussion about the candidates they had interviewed. The convenor or the human resources advisor completed an individual assessment sheet for each candidate ([7] (f) above).

[13] The individual assessment sheet recorded each of the panel members' scores for the group of questions on the interview sheet.

[14] The average of these scores was then calculated and discussed by the panel until a 'consensus' score was reached and recorded on the individual assessment sheet for each candidate in each of the group of questions. No notes of these discussions were made.

[15] The convenor then completed a candidate comparison/summary of ratings sheet for each position. The candidate comparison recorded the consensus ratings for each candidate from the individual assessment sheet and the overall score for each candidate, and therefore identified who the panel would recommend for appointment.

[16] After the interviews the convenor and the human resources representative met with the candidates and advised them of the provisional views of the selection panel and the reasons for their views.

[17] Prior to meeting with the applicants, the convenor and the human resources representative met to discuss the relevant feedback in respect of them. The convenor prepared some handwritten notes and these were used to develop bullet points that were used in meetings with the applicants. The human resources representative took notes of those discussions. The applicants were given a week to comment and provide further information before the panel's recommendations were finalised. The applicants' request for copies of the notes used as the basis of their meetings was refused by the University. Both applicants were provided with typed versions of their individual assessment sheets.

[18] The convenor and human resources representatives considered the feedback provided by the applicants and decided it did not change the panel's provisional recommendation. By letter to the University the convenor set out the panel's recommendations, including a summary of the reasons for the recommendations and brief comment about the applicants who were not recommended for the available positions. Candidate comparison sheets for both positions and copies of the feedback provided by the applicants were also included.

[19] The University provided the applicants with a last chance to provide further comment before it made the appointments. The applicants were also provided with a

copy of the panel recommendations with the parts relating to other candidates blanked out.

[20] Information held by the applicants is listed at par 35 of the parties' agreed statement of facts: it includes the selection criteria, knowledge of the composition of the selection panels, who the other candidates were, feedback received from the selection panel and copies of individual assessment sheets setting out the selection panel's scoring of the applicants.

[21] Pars 36, 37 & 38 of the agreed statement of facts set out the information not held by the applicants. It includes:

a. The interview sheets completed by the selection panel in respect of all the candidates;

b. A candidate comparison/summary of ratings sheet prepared by the selection panel's convenor;

c. Panel recommendations to the University containing information about the successful candidates;

d. Notes created for the meetings with the unsuccessful candidates and notes taken during those meetings; and

e. The "*significant amount of information in the minds of the selection panel members and the decision maker that has not been committed to writing* (including) *selection panel members' views of the candidates' relative strengths and weaknesses* … (their) *assessment of the performance of each candidate during the interview and the impact this had on their views of the candidates' strengths and weaknesses … the selection panel's discussions about each of the candidates which lead to a consensus score* … (the University's) *views following consideration of the feedback received* (from the applicants) *and* (its) *reasoning for not altering the panel's recommendations* (and its) *views on the selection panel recommendations.*"

Applicants' Position Summarised

[22] The applicants rely on s. 4 (1A) (c) of the Employment Relations Act 2000 (the Act):

> ***4 Parties to employment relationship to deal with each other in good faith***
>
> *(1A) The duty of good faith …*
>
> …
>
> *(c) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide the employees affected-*
>
> *(i) access to information, relevant to the continuation of the employees' employment, about the decision; and*
>
> *(ii) an opportunity to comment on the information to their employer before the decision is made.*

[23] The applicants say the University is in breach of this section by dismissing them without providing *"the information and without providing an opportunity to comment"* (par 4 of submissions dated 12 November 2009).

[24] They say the information sought is not confidential and even if it was no good reason to maintain that confidentiality: s. 4 (1B) of the Act.

[25] The selection panel formed views about the competing candidates' relative strengths and weaknesses and had discussions leading to a consensus score being reached: the applicants want access to this information and the opportunity to comment on it.

[26] The effect of s. 4 (1A) of the Act is to impose a mandatory obligation to consult through the provision of relevant information: see *Nee Nee* v *TLNZ Auckland Ltd* [2006] ERNZ 95.

[27] The impact of s. 4 (1A) of the Act is that the decision to dismiss for redundancy cannot occur without full disclosure including perceptions of relative merits of employees and the underlying reasons behind such perceptions. Relevant information therefore includes the selection panel's ratings of applicants' answers to questions in their interview and the answers of other employees to the same questions. That information was relied on by the panel's convenor: there could be errors in that information including perverse or irrational scores, and even addition errors.

Respondent's Position Summarised

[28] Broadly, the applicants argue that s. 4 (1A) (c) requires the University to provide them with information about its assessment of other candidates and an opportunity to respond to this information before a selection decision is made.

[29] The University's primary argument is that s. 4 (1A) (c) does not apply to all information and practical parameters must be placed on what needs to be provided, subject to ensuring employees are sufficiently informed so as to be able to provide a meaningful response.

[30] The University argues that good faith is not a precise or rigid concept, but instead is a broad requirement that requires parties to an employment relationship to treat one another fairly and reasonably. In *Auckland City Council* v *New Zealand Public Service Association Inc* [2003] the Court of Appeal noted that *"it is not possible to lay down rules or protocols defining what may or may not constitute dealing in good faith"* (par 25) and *"what is practicable in the exigencies of particular business operations and workplaces must be kept in mind"* (par 24).

[31] Section 4 (1A) requires an employer who is proposing to make an adverse decision on the continuation of an employee's employment to provide that person with access to relevant information and an opportunity to comment before a decision is made. What constitutes relevant information will depend on the facts of each case.

[32] A requirement to provide all information would be onerous on the employer and, in many instances including this one, would not meet the purpose of the section. In other words, a practical assessment of the information provided should satisfy the

Authority that the applicants were provided with sufficient information such that they were in no way disadvantaged in the contestable environment arising out of the restructuring. The information provided the applicants fairly and reasonably ensured their meaningful response.

[33] Consistent with s. 4 (1a) (c), and as the agreed statement of facts makes clear, in this instance the University provided information *relevant to the continuation of* the applicants' employment, as well as *an opportunity to comment on the information to their employer before the decision* was *made*. That information included details about a restructuring, that the applicants were employees affected by the restructuring, that a contestable reconfirmation process would be applied in respect of new positions created by the restructuring, the selection criteria attaching to those new positions, the provisional views of the selection panel and reasons for those views, and the opportunity to comment on those views before a final appointment decision was reached.

[34] Other information provided the applicants included knowledge of the subject matter of certain questions that would be asked at interview, the composition of the selection panels, the identity of other candidates and their roles within the University and copies of their individual assessment sheets setting out how the selection panel scored them.

[35] Following their interviews the applicants received further information including feedback from the selection panel convenor and human resources representative about their performance in the interviews and the panel's assessment of them, and why they were not preferred.

[36] They received further opportunity to comment prior to the University making a final appointment decision.

[37] The core prerequisites were met, i.e. that the rules of the process including selection criteria were known and fair and adhered to, and bias or lack of genuineness or any other manifestation of bad faith were not present.

[38] The information and process provided the applicants accords with the consultation principles adopted by the Employment Court in *Simpson Farms Limited* v *Aberhart* [2006] ERNZ 825. In particular, *"Sufficient precise information"* was given the applicants so that they could state a view, together with a reasonable opportunity to do so (par 62).

Discussion and Findings

[39] The facts are not in dispute and are set out in the agreed statement dated 11 November 2009.

[40] What is also not in dispute is the restructuring initiated by the University that saw the applicants' positions disappear.

[41] The core issue for determination in this case involves the interpretation and application of s. 4 (1A) (c) of the Act in the context of a contestable selection process following that restructuring.

[42] I agree with the University's argument that the applicants are not entitled to all information but only to relevant information and that what constitutes relevant information will depend on the facts of each case.

[43] I am satisfied that what that means in this instance is that the applicants are, to a limited extent, entitled to more information, and an opportunity to comment on it, if only to ensure there are no issues of perverse or irrational scores or addition errors. That is because a comparison of the applicants with other candidates was fundamental to the termination of the formers' employment and a scrutiny of those comparisons is consistent with their statutory entitlement to relevant information.

[44] What is required is a practical assessment so as to ensure that – consistent with s. 4 (1A) (c) (i) of the Act – the applicants are provided with all relevant, i.e. sufficient, information and an opportunity to comment. I am satisfied such information includes those matters identified at par 21, a, b, & c above, namely:

a. The interview sheets (par 36 (a) in the agreed statement of facts);

b. The individual assessment sheets (par 36 (b) in the agreed statement of facts);

c. The candidate comparison/summary of rating sheets (par 36 (c) in the agreed statement of facts); and

d. Panel recommendations (par 36 (d) in the agreed statement of facts).

[45] I decline the applicants' invitation to reach into the minds of the selection panel members and the decision maker: that is a fraught exercise and scrutiny of sub-atomic particles is not a feature of good faith relationships. Besides, sufficient written relevant evidence exists as to their thinking and the decisions they reached.

[46] In the absence of evidence as to good reason to maintain confidentiality in the context of a publicly contestable process, I decline addressing the privacy/confidential information claims raised by the University at this point so that the parties might confer on practical ways of providing the above information to the applicants in a way that protects the University's concerns.

Determination

[47] The University has breached its obligations under s.4 (1A) (c) of the Act to the extent of not providing the documents set out in par 44 above and is directed to provide the applicants with this information and an opportunity to comment.

[48] Costs are reserved.

[49] Having undertaken to the parties to complete this determination on an asap basis I convey my apologies for the greater than anticipated delay.

Denis Asher
Member of the Employment Relations Authority