IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2023] NZEmpC 2
EMPC 447/2022

IN THE MATTER OF	an application for a sanction under s 140 of the Employment Relations Act 2000
BETWEEN	THE NEW ZEALAND TERTIARY EDUCATION UNION TE HAUTŪ KAHURANGI O AOTEAROA INCORPORATED Plaintiff
AND	VICE CHANCELLOR OF THE AUCKLAND UNIVERSITY OF TECHNOLOGY Defendant

Hearing:	12 January 2023 (Heard at Christchurch via Audio Visual Link)
Appearances:	S Mitchell KC and P Cranney, counsel for plaintiff P Wicks KC and B Smith, counsel for defendant
Judgment:	19 January 2023

JUDGMENT OF JUDGE K G SMITH

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[1] In September 2022, Auckland University of Technology (AUT) began a process of reorganisation with the ambition of securing significant financial savings. AUT's aim, as described in its proposal for financial recovery, was to save at least $21 million in costs. A significant reduction in staff, particularly academic staff, was proposed to achieve that saving.

[2] On 31 October 2022, AUT released a further document about its financial recovery determining staff reductions would occur. In confirming its decision to proceed, the university stated that the timeline to effect organisational change would begin on 31 October 2022, with consultation on the selection criteria to be applied, and end on 1 December 2022 with implementing the outcomes arrived at through this process. In practice, that meant selected staff would be dismissed by notice on 1 December 2022.

[3] After the university presented its proposal it consulted with The New Zealand Tertiary Education Union Te Hautū Kahurangi o Aotearoa Inc (TEU) before eventually confirming its position that savings should be made in the way it proposed. TEU did not accept that the way in which the university went about implementing its proposal complied with the collective agreement between them.

[4] Before the nominated timeline had progressed very far, TEU instructed its lawyers to raise with AUT its compliance with the collective agreement. The subsequent dispute resulted in two determinations by the Employment Relations Authority.[1]

[5] What TEU sought to place in issue was whether the university's approach to potential staff redundancies complied with cl 10.3 of their collective agreement, which controls how surplus staffing is to be dealt with. Issue was taken with the selection criteria. The union's attitude was that positions needed to be identified as surplus and that what the university had done, in effect, was to make selections addressing personal attributes of the holders of positions, an assessment which was said to be not relevant to the process under the agreement.

[6] The university did not accept the union's criticism of its selection criteria which was said to relate to research output and teaching contributions not individual attributes.

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1 *Tertiary Education Union v Vice Chancellor Auckland University of Technology* [2022] NZERA 676 (Member Dumbleton) [First determination]; and *Tertiary Education Union v Vice Chancellor Auckland University of Technology* [2022] NZERA 690 (Member Dumbleton) [Compliance determination].

[7] As a consequence of the university's response, TEU applied to the Authority for a compliance order. The application was accorded priority. On 19 December 2022 the Authority issued its first determination largely agreeing with TEU's application. It concluded that, in principle, a compliance order under s 137 of the Employment Relations Act 2000 (the Act) could be made. Orders were not made immediately because the Authority provided an opportunity for the parties to reflect on the determination before considering if an order would be necessary.[2]

[8] The parties did not reach any agreement resolving their dispute. A few days later, on 22 December 2022, the Authority made compliance orders. Four orders were made the effect of which was to prevent AUT from completing its reorganisation as previously announced, in particular preventing the dismissal of staff by notice dated 1 December 2022. The orders effectively restated the parties' obligations under the collective agreement.

[9] The four orders were:[3]

> A. On or before 5 pm on 23 December 2022, in relation to academic staff employed by AUT and who are members of TEU, AUT shall desist from:
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> (1) terminating their employment, and/or
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> (2) giving notice of termination of their employment, and/or
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> (3) where notice of termination is currently in force, allowing the period of that notice to elapse or to continue to elapse.
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> B. On or before 23 December 2022, AUT shall notify TEU and academic staff who are TEU members and who are currently under notice, that it has complied or will comply by 23 December 2022, with the order to desist given under A. above.
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> C. Following compliance with the order under A. above, AUT shall not, in reliance on any grounds under Part 10 of the [collective agreement], terminate the employment of academic staff who are members of TEU or give notice of termination of their employment, until AUT has complied with all applicable provisions of Part 10 of the [collective agreement], and in particular complied with clause 10.3.3(i).
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> D. AUT must identify specific positions as surplus by reference to the name of the current position holder, and where there is more than one position and more than one employee per position, AUT shall then call for

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2 First determination, above n 1, at [52].
3 Compliance determination, above n 1, at [6].

> voluntary severance from the employees potentially affected. AUT shall in accordance with clause 10.3.3(i) determine which, if any, of those employees who request voluntary service shall be granted voluntary severance.

[10] What is now in issue is TEU's contention that the university's subsequent steps purporting to comply with the determination did not satisfy orders B and D.

[11] To place the orders into context it is necessary to briefly consider the relevant provisions of the collective agreement. The collective agreement is operative from 1 July 2021 to 30 June 2022.[4] Part 10 deals with organisational change.

[12] Clause 10.1 provides for consultation. Clause 10.3 deals with surplus staffing and how to identify it. Under cl 10.3.1 surplus staffing is defined as existing when, as a result of a reduction in funding, organisational changes or "other identified factors" a reduction in the number of employees is required.

[13] Under cl 10.3.2(a) the university is to advise in writing individual employees who might be affected by its review of the organisational structure or function and to also advise them of their right to assistance from TEU.

[14] Under cl 10.3.2(b) the process and/or criteria for determining specific positions which are to be declared surplus to requirements is to be determined by the university following consultation with TEU.

[15] The compliance orders were concerned primarily with compelling AUT to satisfy cl 10.3.3 of the collective agreement. Relevantly it provides:

> **10.3.3 Notification**
> Once specific positions have been identified as surplus to requirement:
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> (i) If there is more than one position and more than one Employee per position is potentially affected, the Employer shall call for voluntary severance from the Employees potentially affected. The Employer shall determine which, if any, of those Employees who request voluntary severance shall be granted voluntary severance, having due regard to retaining a viable skill and experience base within the reduced

[4] No issue was taken with the collective agreement continuing to apply presumably in reliance on ss 52 and 53 of the Act.

> workforce. Any Employee who is granted voluntary severance shall receive two months' notice prior to the date of discharge. This date may be varied by agreement between the Employer and the Employee.
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> (ii) If there is only one position affecting only one Employee or in respect of staff for whom severance is not voluntary, the Employer shall advise the National Secretary of TEU, the Chair of the AUT President of TEU and the Employee(s) affected not less than two months prior to the date by which the Employee is to be discharged. This date may be varied by agreement between the Employer and the Employee.
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> …

[16] Once surplus staffing has been established the options available to AUT are in cl 10.4. They are voluntary severance as provided for in cl 10.3, attrition, redeployment, retraining and severance. The collective agreement states as an aim minimising the use of severance.

[17] In the determination of 19 December 2022, the Authority analysed pt 10, describing it as a scheme intended to be a sequence of essential steps to be taken where organisational change occurs.[5]

[18] The Authority recognised that pt 10 did not define "specific position[s]".[6] But it concluded that "specific position[s]" became identifiable once criteria for that purpose were determined and applied under cl 10.3.2(b).[7]

This application

[19] Before the Authority issued its compliance orders AUT gave notice terminating the employment of academic staff it had identified as surplus to its requirements by applying criteria it had established. That notice was given on 1 December 2022 and explains compliance orders A and B.

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5 First determination, above n 1, at [21].
6 At [23].
7 At [24].

[20] TEU maintains that AUT's actions after the compliance orders were made breached orders B and D, warranting the imposition of a sanction under s 140(6) of the Act. Specifically, it sought a fine.[8]

[21] On 22 December 2022, after the Authority made the compliance orders, the university sent an email and letter to the staff to whom it had previously issued notices on 1 December 2022 terminating their employment. AUT advised them that those notices were suspended.

[22] On 22 December 2022, AUT wrote to its academic permanent staff to provide an update to those it described as impacted by the proposal and within its scope. As well as confirming that the notices of 1 December 2022 were suspended staff were advised that in implementing the Authority's determinations three steps were required.

[23] The first step would be to provide a table setting the specific positions that had been identified as surplus to requirements by position and name of position holder.

[24] The second step would be to write to those who held specific positions identified as surplus confirming that those positions were surplus and that the position holders had an opportunity to request voluntary severance.

[25] The third identified step was to write to those staff who held equivalent positions to those identified as surplus to requirements, advising them they were entitled to request voluntary severance.

[26] AUT took all three steps the same day. The table sent to permanent staff actually listed those staff members who were previously given notice of termination of employment on 1 December 2022. The correspondence stated that, in accordance with paragraph [35] of the Authority's determination and [6](D) of the compliance orders, the university had identified the specific positions that were surplus by reference to the name of the staff members holding them. The correspondence called

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[8] Under s 140(6) where there has been a failure to comply with an Authority compliance order, the remedies available include the Court staying or dismissing proceedings, striking out a defence or entering judgment, a term of imprisonment not exceeding three months, a fine not exceeding $40,000, or an order that the property of the person in default be sequestered.

for volunteers for redundancy from all staff with the aim of reducing the need to make compulsory redundancies.

[27] Notably, the letter to staff whose positions were not on the table advised them that:

> …You do not hold one of the specific positions, but you hold an equivalent position. As a potentially affected staff member you are now entitled to request voluntary severance. …
>
> (emphasis original)

[28] TEU's claim was that AUT's letters and emails after the Authority orders repeated the conduct and actions that were found to breach the collective agreement.

[29] Mr Mitchell KC, counsel for TEU, accepted that it is the wording of the compliance orders that determine whether or not there has been a breach. However, he invited the orders to be read in the context of the determinations as a whole because that shows what they were intended to address and also prevented the orders from being too readily circumvented.[9]

[30] The union's case has not altered since it placed AUT on notice about the method by which selection of surplus staff was required to be undertaken under cl 10 of the collective agreement.

[31] Mr Mitchell described the requirements of cl 10 as being for the university to follow a process identifying positions as surplus. Using as an example the position of a lecturer in mechanical engineering, he said the notification process is one where all lecturers holding that position are advised that they are potentially affected. A call is then to be made for volunteers from among lecturers in mechanical engineering because they are "potentially affected" within the meaning of cl 10.3.3.

[32] That process was reflected in order D which was said to be breached because of the steps taken by the university on 22 December 2022 referred to earlier. The breach was that the university had merely confirmed the prospect of dismissal for those

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[9] Relying on *NZ (with exceptions) Shipwrights etc Union v General Motors NZ Ltd* [1990] 3 NZILR 563 (LC) at 566.

staff members who were given notice on 1 December 2022. In relation to everyone else holding what was referred to as equivalent positions, the university had provided them with an opportunity to volunteer to end their employment.

[33] The criticism of AUT's approach was twofold. First, Mr Mitchell submitted that the correct position was for AUT to identify specified positions as surplus. He submitted that it is the position that is to be declared surplus not the staff member. The breach of the order was said to be that at the time a position was identified as surplus the actual academic staff member facing dismissal was also identified. Second, the correspondence to those staff who were not named in the table described them as holding equivalent positions. The correspondence differentiated between potentially affected staff and those who were not affected at all. Order D and cl 10 do not refer to equivalent positions and that meant the university had merely repeated what it did before. AUT was not calling for volunteers from amongst all those employees who were potentially affected but from a different group.

[34] The point of these submissions was that the structure of cl 10.3.3 creates a level playing field. That is, at the time the position is determined to be surplus potentially affected staff are told before a decision is to be made about who will be selected. An opportunity for voluntary severance is to be offered to all staff falling within that category or group.

[35] Mr Mitchell submitted that order B was breached because the communication on 22 December to staff who were given notice of termination on 1 December 2022 advised them that the notice they received was "suspended". He said that a suspension implied it could be reactivated at a future time and was not what was required by the terms of the order. Suspension of the notices of termination was not one of the possibilities referred to in order A and therefore AUT's response did not comply.

[36] Mr Wicks KC, counsel for AUT, submitted that none of the compliance orders were breached. Although not raised by the pleadings, for completeness he identified TEU's steps taken to satisfy compliance orders A and C. As to order A, the university had taken steps to ensure the notices of termination did not end any employee's employment.

[37] As to order C, AUT was not to terminate the employment of academic staff who are members of the union or give notice of termination of their employment until it had complied with the provisions of pt 10. The university had not dismissed staff.

[38] Mr Wicks said that order B was complied with. AUT had written to staff members on 22 December 2022 suspending the notices of termination they received on 1 December and had provided the union with a template copy of the letter suspending notice of termination.

[39] As to order D, it was said to be complied with because it required AUT to:

(a) identify specific positions as surplus by reference to the name of the current position holder; and

(b) where there was more than one position and more than one employee per position, the university was to call for voluntary severance from employees potentially affected.

[40] Mr Wicks' point was that the two letters AUT wrote on 22 December 2022, and which the union complained about, read in combination meant that the order was satisfied because the university:

(a) identified the specific positions that were determined to be surplus to requirements by reference to the name of the current position holder and the title of that person's role; and

(b) where there was more than one position and more than employee per position, it had called for voluntary severance from employees holding equivalent positions.

[41] Mr Wicks emphasised that the Authority had described cl 10 as a "person-centric contract" and that the breach identified by the Authority that resulted in a compliance order only occurred at the point in the process where AUT identified

employees who might be dismissed for redundancy.[10] In particular, fault had not been found with the university's consultation or selection criteria.[11]

Analysis

[42] The starting point is that the purpose of s 140(6) of the Act is to be coercive. It is to force the defaulting party to comply with the Authority's orders.[12] To impose a sanction it is necessary to ascertain what the Authority's orders were, establish the behaviour of the party said to be in default and to consider whether a sanction is appropriate.

[43] Orders A and B are clear and straightforward. Order A has the effect of requiring the university to not continue on the path it set for itself and, effectively, precluded it from dismissing staff until pt 10 of the collective agreement was satisfied.

[44] Order B is an adjunct to order A. It required notice to be given so that staff were informed that the university had, in fact, desisted from the course of action which the Authority determined was inappropriate.

[45] Order C preserved the status quo as it was before notice of termination of employment was given to affected staff because it requires pt 10 to be carried into effect.

[46] Order D is effectively a restatement of part of cl 10.3.3. There is some tension in what order D requires. AUT was to identify specific positions as surplus and having done so according to its criteria to then call for volunteers to accept severance "from the employees potentially affected". The order does not explain how that group of employees is to be identified.

[47] Mr Wicks was correct to observe that the Authority described the collective agreement as "person-centric" and that in the detailed discussion of the meaning of

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10 First determination, above n 1, at [19].
11 Compliance determination, above n 1, at [7].
12 *Peter Reynolds Mechanical Ltd v Denyer (Labour Inspector)* [2016] NZCA 464, [2017] 2 NZLR 451 at [75].

"specific position" in the collective agreement emphasised that an essential component of that evaluation was the employee, referred to in the determination as the person or individual who was the current position holder.[13] That detail was described by the Authority as part of the specificity required in identifying positions as potentially surplus.

[48] That explains why Mr Mitchell emphasised that the terms of the order need to be considered against the whole of the Authority's determinations. At paragraph [30] of the first determination the Authority agreed with the union that potentially affected staff are not:

> …the people selected for redundancy but are staff who hold positions that could be determined surplus. That occurs when the selection criteria have been established and are applied, which is the sequential step to be taken to identify 'specific positions'.

[49] Despite the possible difficulty over the wording of order D the determination was not challenged by either party. The parties proceeded on the basis that order D was capable of being implemented.

[50] It is useful to remember that redundancy is concerned with the loss of a position or job.[14] Order D contemplates, as does cl 10.3.3, a means by which positions are identified as surplus to AUT's requirements. Once the surplus positions are established the collective agreement requires voluntary severance to be offered to the employees "potentially affected". Order D does the same thing, but paragraph [30] in the determination indicates that the group of employees to be offered voluntary severance is wider than those selected and must mean those who were, at the time volunteers were called for, still within the group who could potentially be dismissed.

[51] If order D was read in any other way, all the people and positions potentially affected would be identified in the table that was distributed on 22 December, obviating the need to seek volunteers.

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13 First determination, above n 1, at [27].

14 *GN Hale & Son Ltd v Wellington etc Caretakers etc IUOW* [1991] 1 NZLR 151 (CA) at 155.

[52] When AUT wrote to other staff informing them they held equivalent positions and could seek voluntary severance it was attempting to comply with order D. Its correspondence in fact stepped outside the orders terms because those staff were informed that they were not potentially affected employees but fell into a different category. The order did not refer to equivalent position holders being invited to seek voluntary severance and nor does the collective agreement. What AUT did was outside the scope of both of them.

[53] I do not accept Mr Wicks' submission that AUT complied with the order by writing to those staff on the table and had gone further than required by its terms in seeking volunteers from a wider group. Such an interpretation would be inconsistent with the Authority's determinations. It follows that the way AUT wrote to staff on 22 December 2022 did not comply with order D.

[54] However, it has complied with order B. The university suspended the notices of dismissal. Its letters to staff did not describe what was meant by a suspension although in using that language it repeated a comment by the Authority in the first determination. The Authority, in concluding that AUT could be ordered to identify specific positions, made the observation that:[15]

> …This will require a suspension or withdrawal of the notice given to staff on 1 December.

[55] AUT should not be criticised for using the Authority's language in responding to its order. The compliance order did not unequivocally require the notices of dismissal to be withdrawn. Order A(3) required AUT to not allow the period of notice "to elapse or to continue to elapse". There is no meaningful difference between those concepts, but the point is that AUT was to make sure that staff did not lose their positions because of the notice issued on 1 December. That is what it did.

[56] The university is required to give two months' notice. The effect of having suspended the notice means that, in reality, it will not be able to reactivate the notices already given. It will need to start again.

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15 First determination, above n 1, at [45].

[57] Where the Authority referred to a suspension, and the order which is required to be complied with did not stipulate a withdrawal of the notice as necessary, it would be wrong to conclude that a breach occurred.

A sanction?

[58] The maximum available fine is $40,000.[16] The union's claim asked for a fine but did not state how much was sought. Initially Mr Mitchell's submissions emphasised that it was more important to the union that it obtain recognition from the Court that the Authority's order was breached rather than to make submissions about the level of the fine to be imposed. Eventually he requested a fine of half the available maximum, meaning $20,000, and referred to two decisions where a personal grievance had given rise to compliance orders in *Cooper v Phoenix Publishing Ltd* and *Cousens v Star Nelson Holdings Ltd*.[17] In those cases the fines were in the order of $12,000–$10,000 respectively.

[59] Mr Wicks argued that if a sanction was imposed, a cautious approach ought to be taken. The Court should only act if satisfied there had not only been non-compliance, but wilful and deliberate non-compliance as opposed to something accidental or involuntary.[18] He drew on observations made by the Court in *Labour Inspector v Peter Reynolds Mechanical Ltd t/a The Italian Job Service Centre*. While Mr Wicks referred to the Court's decision in that case, it was the subject of a successful appeal to the Court of Appeal.[19]

[60] Mr Wicks submitted that in determining the level of a sanction it is appropriate to take into account:[20]

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16 Employment Relations Act 2000, s 140(6).

17 *Cooper v Phoenix Publishing Ltd* [2020] NZEmpC 111, [2020] ERNZ 332; and *Cousens v Star Nelson Holdings Ltd* [2022] NZEmpC 30.

18 Relying on *Feather (Labour Inspector) v Payne* EmpC Auckland AEC4/97, 4 February 1997 at 5; and *Denyer v Peter Reynolds Mechanical Ltd t/a The Italian Job Service Centre* [2015] NZEmpC 41, [2015] ERNZ 635.

19 *Peter Reynolds Mechanical Ltd*, above n 12; the Court of Appeal did not materially alter the factors to be taken into account.

20 At [73]–[77].

(a) The level of culpability (including the nature, scope and duration of any default).

(b) The need for deterrence and denunciation.

(c) Whether the defendant has committed similar previous breaches.

(d) The attitude of the defendant.

(e) Whether the defendant has taken any steps to address its non-compliance.

(f) The defendant's circumstances including its financial position.

(g) The desirability of a degree of consistency in comparable cases.

[61] It was said that any fine ought not to be disproportionate to the gravity of the defendant's default. Applied to the university's circumstances it was submitted that:

(a) Its culpability was low.

(b) There is no need for deterrence or denunciation given the genuine attempts by it to comply with its interpretation of its obligations under the orders.

(c) It has no similar previous breaches.

(d) The attitude of the defendant is one that demonstrates a desire and attempt to comply.

(e) It has taken appropriate steps to respond to the plaintiff's allegations.

[62] Mr Wicks also drew on other cases said to reflect in some way the appropriate level of a fine. In 2013, in *Christiansen v Sevans Group (NZ) Ltd*, the Court imposed a modest fine of $2,500 for a first instance breach where there had been a lengthy

period of non-compliance of nearly two years.[21] He also referred to *Myatt v Pacific Appliances Ltd* where a fine of $15,000 was imposed relating to the non-payment of a penalty of $1,500 for non-compliance with an improvement notice which required the party to remediate breaches of statutory minimum standards of employment.[22]

[63] Mr Wicks said that there was no evidence that AUT disregarded the processes of the Authority, or the Court. Further, he submitted there was no evidence of extended non-compliance or other behaviour contributing to the situation.

[64] In the Court of Appeal's decision in *Denyer* an observation was made that it is difficult to assess any trend in the imposition of penalties in cases before this Court.[23] Despite the passage of time since that decision the position remains essentially unchanged. There are very few cases from which assistance might be obtained. That is at least evident in the fact that Mr Mitchell referred to only two cases, and they were not really comparable to the present situation. The decisions Mr Wicks referred to are now aging and not on all fours with this case either. The best they might provide is some broad and general guidance.

[65] I consider a sanction is required, but I agree that the university's culpability is low. It identified positions surplus to requirements by naming the individuals, positions they held at that time, and the school and faculties in which the individuals were appointed. It is evident in those steps that the university was attempting to comply, although it should have been apparent to it that the result of its actions would not be materially different from the approach the Authority rejected and that it was therefore unlikely to be correct.

[66] I agree that there is no need for either specific or general deterrence or denunciation of the university arising from these actions. There is nothing in the university's behaviour which suggests it will not modify its actions as a result of this decision.

[67] The university has no previous breaches.

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21 *Christiansen v Sevans Group (NZ) Ltd* [2013] NZEmpC 11.
22 *Myatt v Pacific Appliances Ltd* [2016] NZEmpC 24.
23 *Peter Reynolds Mechanical Ltd*, above n 12, at [72].

[68] The union has shown that there was one breach of order D. A modest fine for a breach is appropriate in this case. I have considered Mr Wicks' submissions that only flagrant disregard or non-compliance with an Authority order should attract a fine, but I am not drawn to that submission. The order was breached. The university has, effectively, carried on the path it set for itself in about September 2022 without modifying its behaviour to comply with cl 10.3.3 which is reflected in order D. While not flagrant in the sense used by Mr Wicks, it is still a breach of the order justifying the imposition of a fine.

[69] In all the circumstances I think it is in the interests of justice to impose a fine of $3,000. The fine will be payable to the union.[24]

Outcome

[70] The union's application is successful. The university was in breach of compliance order D and it is fined $3,000 pursuant to s 140(6) of the Act. The amount of that fine is payable to TEU.

[71] Costs are reserved. In the absence of agreement counsel may file memoranda.

K G Smith
Judge

Judgment signed at 4.20 pm on 19 January 2023

[24] Employment Relations Act, s 140(7).