IN THE EMPLOYMENT COURT
AUCKLAND

[2015] NZEmpC 169
EMPC 319/2014

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	TERTIARY EDUCATION UNION Plaintiff
AND	VICE-CHANCELLOR, UNIVERSITY OF AUCKLAND Defendant

Hearing:	25 August 2015 (Heard at Auckland)
Appearances:	S Mitchell, counsel for plaintiff P Muir and A Sinclair, counsel for defendant
Judgment:	30 September 2015

JUDGMENT OF JUDGE CHRISTINA INGLIS

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[1] This proceeding relates to a dispute as to the meaning of clauses in the parties' collective employment agreement.[1] It follows determination of a claim brought by the Tertiary Education Union (the TEU) in the Employment Relations Authority (the Authority).[2]

[2] Clause 2 of the agreement sets out provisions relating to the review of a number of policies, including (for present purposes) the Academic Grades - Standards and Criteria Human Resources Policy dated June 2007 (the AGSC policy). The AGSC policy deals with appointments to and advancement within and between academic grades.

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1 Academic Staff Collective Employment Agreement 20 December 2013–30 June 2015.
2 *Tertiary Education Union v Vice-Chancellor, University of Auckland* [2013] NZERA Auckland 256.

[3] The sole issue before the Court is whether the Vice-Chancellor has the right to amend the AGSC policy at any time after the review process referred to in cl 2 has been brought to an end. These proceedings are not about whether the review process that has been undertaken has been adequate or appropriately concluded. Nor does it require consideration of more general questions about the ambit of the amendment powers conferred on the Vice-Chancellor.

[4] The TEU's challenge was pursued on a de novo basis.

Framework for analysis

[5] The interpretative exercise is directed at establishing the meaning the parties to the agreement (the Vice-Chancellor and the TEU) intended the words in dispute to bear.[3]

[6] The starting point is an assessment of the natural and ordinary meaning of the words themselves. Even if the words are plain and unambiguous, a cross-check will nevertheless be undertaken against the contractual context.[4] If the words are ambiguous the inquiry will similarly move to an assessment of relevant facts and circumstance. This part of the process is directed at ascertaining the meaning of the words when read contextually.

[7] The second stage of the interpretative exercise may result in the preliminary assessment of meaning being dislodged. Such a result will not readily arise. That is because the plainer the words used, the more improbable it is that the parties intended them to be understood in any sense other than what they plainly say. However, the Court will not ascribe to the parties an intention that a properly informed and reasonable person would not ascribe to them when aware of the circumstances in which the agreement was made.[5] It follows that dislodgment of an apparently plain and ordinary meaning may occur when such a meaning would lead

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3 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444 at [19].

4 *Pyne Gould Guinness Ltd v Montgomery Wilson (NZ) Ltd* [2001] NZAR 789 (CA) at [29]; *Vector Gas* at [22]; *Silver Fern Farms Ltd v New Zealand Meat Workers and Related Trade Unions* Inc [2010] NZCA 317, [2010] ERNZ 317 at [13]-[14], [36].

5 *Vector Gas* at [4], [22], citing the five principles set out by Lord Hoffman in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 [HL] at 912-913.

to a nonsensical result, whether because it defies commercial common sense or otherwise.[6] Exceptionally, words used may be construed as having another meaning where the parties have adopted a special meaning or where estoppel arises.[7]

[8] An objective approach is required. That impacts on the proper scope of the evidence. Evidence of facts, circumstance and conduct relating to the negotiations which show objectively the meaning the parties intended their words to convey is relevant to the contextual inquiry, including the circumstances in which the agreement was entered into.[8] Evidence of post contractual conduct may be relevant if it tends to establish a fact or circumstance capable of demonstrating objectively what meaning both parties intended their words to bear.[9] Evidence of what a party subjectively intended or understood their words to mean, or what their negotiating stance was at any particular time, is irrelevant.[10]

The words used

[9] Both parties submit that the words of the agreement are clear, although they arrive at diametrically opposite conclusions as to what they mean.

[10] The relevant clauses are as follows:

> **2 MUTUAL RESPONSIBILITIES**
>
> …
>
> **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.

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6 *Pyne Gould* at [18], [29].
7 *Vector Gas* at [25], [34] per Tipping J.
8 At [27].
9 At [31].
10 At [14].

> **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:
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> (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.*
>
> …
>
> **2.8** 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. (emphasis added)

[11] Clause 3.0 of sch 2 refers specifically to the AGSC policy. It is entitled "Promotion Criteria – Academic Grades, Standards and Criteria Principles" and provides that:

> Appointments to, and advancement within and between, academic grades shall be in accordance with the "Academic Grades – Standards and Criteria" HR Policy dated June 2007, which *may be amended from time to time by the Employer according to the terms of participation in clause 2.6 and according to the following principles:*
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> … (emphasis added)

[12] A plain reading of the above provisions leads me to the following preliminary conclusions as to meaning. There is a recognition that employees covered by the agreement are entitled to participate in the academic governance of the University and that collective participation is of particular importance to academic matters. The entitlement to participate is circumscribed.[11] It is the Council that is ultimately responsible for governing the University. It is significant that this is reinforced in cl

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[11] As cl 2.4 makes clear by use of the words "as provided in this clause"; and cl 2.6 which sets out the nature and scope of employee participation.

2.4, which refers to the entitlement to participate while expressly "… acknowledging that the University is governed by its Council." The Vice-Chancellor summarised the position in the following way in cross-examination:

> Q. So academic governance isn't entirely a matter for you. It's a responsibility that you share with your employees?
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> A. That is correct.
>
> Q. And that's unique or certainly specific to your sector isn't it?
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> A. It's certainly a characteristic of the tertiary sector through the Education Act that is right.
>
> …
>
> Q. And so the review is an area where governance is shared between you and your employees isn't it?
>
> A. That's true.
>
> Q. And you are both mutually responsible for that governance?
>
> A. Well we are mutually responsible. We have a mutual contribution to it. That doesn't necessarily mean that both parties have an equal role in making the final decision.

[13] Clause 2.6 prescribes a process by which effective participation in the academic governance of the University is to be achieved. The application of the process itself is limited to circumstances in which the employer wishes to review certain University policies, including the AGSC policy. As the introductory words of cl 2.6 make clear, it is the employer's review. It is not a joint review, although the TEU participates in it. When undertaking the review the employer is required to comply with the prescribed participatory process set out in cl 2.6(a) to (c). While the review process itself is dealt with in cl 2.6, power to amend is dealt with elsewhere (at Sch 2, cl 3). The power to amend is expressed to reside solely with the employer.

[14] Relevantly, other policies, which are not expressed to be subject to the participatory processes set out in cl 2.6, may be amended from time to time by the employer following appropriate "consultation" and on reasonable notice. Mr Mitchell, counsel for the TEU, submitted that the fact that amendment following "consultation" was permitted under cl 2.6 in relation to some policies meant that the "participation" provided for in cl 2.6 in relation to other policies must result in

agreement prior to amendment, otherwise it would amount to a distinction without substance.

[15] Participation is not synonymous with decision-making. It is evident that the distinction between "consultation" and "participation" under the collective agreement lies in the fact that the parties have agreed a process of engagement that must be undertaken in a particular way prior to any amendment to certain stated policies (one of which is the AGSC policy) but the parties have not done so in relation to other policies, which only require consultation and notification. The agreed process of engagement (which includes a requirement that it be undertaken in a collegial and co-operative manner) has been put in place for the stated objective of effective participation in academic governance. No mention is made of the need for agreement, either in terms of the outcome of the review or prior to any amendment, to achieve that objective. Rather the parties have conferred an express power on the Vice-Chancellor to amend the AGSC policy under cl 3 of Sch 2.

[16] Mr Mitchell submitted that, absent agreement at the conclusion of the review process as to any amendment, the collective agreement and ASGC policy must remain unchanged. I agree with Ms Muir that such an interpretation is at odds with the plain and ordinary meaning of the words of the relevant clauses, and does not accord with common sense. Clause 3 states that the ASGC policy "may be amended" by the employer. It does not link the amendment to any agreement reached with the TEU. The plaintiff's argument essentially requires a fourth sub-clause to be written in to cl 2.6, requiring the parties to agree on the outcome of the review and as to any amendment to the policy.

[17] The power to amend is expressed as "according to the terms of participation in clause 2.6" (cl 3), "in accordance with provisions 2.4 to 2.6" and in accordance with certain stated principles. In my view the terms of participation are the prescribed process requirements which are directed at informing, but not dictating, the ultimate decision. Those process requirements are designed to meet the policy objective of ensuring effective participation in academic governance. On a plain wording of the relevant provisions, once those process requirements have been satisfactorily undertaken, the power to amend is activated.

Displacement of plain meaning?

[18] While the ordinary or plain meaning of the contractual text is an important (and usually the primary) consideration, extrinsic contextual material can throw important light on the interpretative exercise.[12]

[19] Relevantly, the clauses at issue represent a significant change from clauses in the parties' earlier collective employment agreement.[13] The previous agreement included a specific power of veto by the TEU, under cl 3.0 of sch 2. It provided that:

> **3.0 PROMOTION CRITERIA**
>
> The standards and criteria to be used by the University in considering applications for the following grades are contained in the 'Academic Grades – Standards and Criteria' HR Policy dated 1.12.01 or such subsequent policy *as may be agreed by TEU* ("Criteria Policy"). (emphasis added)

[20] Associate Professor Dr Mark Amsler, who gave evidence on behalf of the plaintiff, accepted that the AGSC policy could only be amended by agreement with the Union under the previous collective agreement. It is significant that the right of veto, or requirement for TEU agreement, finds no express reference in the current collective agreement. It is clear that the omission of "as may be agreed by TEU" from the current agreement was deliberate. The reason for its absence is explained by a consideration of the background to the current contractual terms.

[21] On 25 November 2010 the Vice-Chancellor wrote to the TEU and staff on individual employment agreements putting forward a proposal for a salary increase and an additional week of annual leave in exchange for removing a number of policies from the collective agreement and incorporating them in policy manuals. The AGSC policy was identified as a "major item". The Vice-Chancellor's letter advised that:

> The University proposes to remove all policies that are currently contained in or annexed to academic employment agreements and incorporate them in the relevant University policy manuals. These policies would continue to exist alongside employment agreements. The University would remain

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12 *Vector Gas* above n 3 per McGrath J at [53]-[78].

13 Academic Staff Collective Employment Agreement 1 July 2009-30 June 2010.

committed to consulting with employees and the unions about any proposed changes to a policy, and to providing employees with reasonable notice before any changes took effect. …

In return for agreeing to these proposed changes, I am offering you:

- An increase of 4% on your current base salary; and
- An increase to five weeks annual leave for those staff who currently receive a lesser annual entitlement. This will accrue from 1 February 2011. …

I need to make it clear that the University can afford a salary increase such as this for academic staff only if we can achieve the administrative efficiencies and realize the productivity gains that will follow from the changes to the employment agreements. The offer of an increase in salary and annual leave is therefore conditional on acceptance of those changes. …

[22] Academic staff on individual employment agreements subsequently reached agreement with the Vice-Chancellor in February 2011. The TEU took a different approach and lengthy negotiations between the parties ensued. The Vice-Chancellor's consistent approach throughout was to remove Human Resources policies, including the AGCS policy, from the collective agreement. Ultimately the parties attended facilitated bargaining. As a result, the Authority issued a recommendation dated 23 November 2011. The recommendation states:

> [15] The Vice Chancellor points to the high degree he considers he compromised during the facilitated bargaining. Although the result of that will allow him to achieve the objective of removing some 5 specified conditions from the collective agreement and have them become matters of policy, TEU will retain some control over the Vice Chancellor's ability to amend those policies from time to time. "Collars" negotiated will achieve this.

[23] Dr Amsler (who had not been a member of the bargaining team and could not give direct evidence of events relating to the facilitation) nonetheless accepted in cross-examination that the Vice-Chancellor had achieved his objective of having the policies removed into the Human Resources policy framework. The Vice-Chancellor gave evidence, which was not challenged and which I accept, that the "collars" were the provisions at cls 6.3 (for Research and Study Leave), 7 (for Outside Employment) and sch 2, cl 3.0 (for Academic Grades - Standards and Criteria) which established principles to be applied should those policies be amended.

[24] Also relevant is the fact that a very substantial amount of money (over $11m in total, including benefits such as the increase to five weeks annual leave) was agreed in consideration for the changes that the Vice-Chancellor pursued and managed to negotiate. For the Vice-Chancellor to have agreed to a term which would enable the TEU to effectively veto any change (which was precisely the pre-existing term that the Vice-Chancellor had wished to negotiate out of the agreement) for payment of such magnitude would make no business, or other, sense.

[25] A consideration of the background context reinforces the preliminary conclusions I have reached in relation to meaning.

Conclusion

[26] The Vice-Chancellor may amend the AGSC policy once the participatory process has been completed. He is not required to engage in a further review, agree a variation to the current collective agreement or negotiate a new collective agreement prior to doing so.

[27] Costs are reserved. If there is any issue as to costs I will receive memoranda, with the defendant filing and serving any memorandum together with any supporting material within 30 days of the date of this judgment. The plaintiff is to file and serve any memorandum and supporting material in reply within a further 20 days, and anything strictly in reply within a further 10 days.

Christina Inglis
Judge

Judgment signed at 2.30 pm on 30 September 2015