

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2021] NZEmpC 129
EMPC 180/2019**

IN THE MATTER OF a challenge to a determination of the
 Employment Relations Authority

BETWEEN DAVINIA CADDY
 Plaintiff

AND VICE-CHANCELLOR, UNIVERSITY OF
 AUCKLAND
 Defendant

Hearing: 1–4 and 7 December 2020
 (Heard at Auckland)

Appearances: SR Mitchell and J Lynch, counsel for plaintiff
 P Muir, R Judge and R Cabraal, counsel for defendant

Judgment: 13 August 2021

JUDGMENT OF JUDGE KATHRYN BECK

[1] This is a challenge to a determination of the Employment Relations Authority.¹

[2] Dr Caddy was employed by the University of Auckland as a Senior Lecturer in Musicology in the School of Music in the Faculty of Creative Arts and Industries. In 2017 there was an external review of the School which made a number of recommendations.

¹ *Caddy v Vice Chancellor University of Auckland* [2019] NZERA 275 (Member Campbell).

[3] In 2018 the University commenced a restructuring process to address the financial position of the School, which had been in deficit for seven years, and give effect to the recommendations of the review.

[4] Despite performing at the highest level as a researcher,² as a result of this restructure Dr Caddy was made redundant.

[5] She says that her dismissal was unjustified and that the restructure was substantively and procedurally flawed. In particular, she takes issue with the decision not to redeploy her into a new role in the School. She seeks reinstatement.

[6] The University says the restructure was necessary and followed a fair process. It says Dr Caddy's job no longer exists.

[7] The question for the Court is whether Dr Caddy's dismissal was justified and if not, what remedy she should be awarded.

The issues

[8] The key issues for determination are divided into three parts:

- (a) The disestablishment of Dr Caddy's position as Senior Lecturer of Musicology;
- (b) the decision not to redeploy her into the role of Lecturer/Senior Lecturer in Music Studies, specialising in Music Studies and Jazz Studies; and
- (c) remedies.

Disestablishment of position

[9] The issues for determination are:

² Dr Caddy achieved a PBRF (Performance Based Research Fund) rating of A.

- (a) Was the disestablishment of Dr Caddy's position substantively justified – are there genuine reasons?
- (b) Was the process followed to disestablish the position fair and reasonable?

[10] If the answer to either of these questions is No, then we move to the question of remedies.

[11] If, however, both are answered Yes, then we move to the next area of inquiry.

Decision not to redeploy

[12] Having determined that the surplus staffing situation existed, and that Dr Caddy's position was disestablished, was the decision not to redeploy Dr Caddy, and therefore terminate her employment, one a fair and reasonable employer could have made in all the circumstances at the time?³

[13] In particular:

- (a) Did the University investigate options in good faith which would prevent any loss of employment for Dr Caddy?⁴
- (b) Did the University make reasonable efforts to redeploy Dr Caddy?⁵
- (c) Did the University comply with its Review and Restructure Policy and Procedures?

[14] In the event that the answers to these questions are No, we turn to the issue of remedies.

³ Employment Relations Act 2000, s 103A.

⁴ Academic Staff Collective Agreement 1 September – 31 August 2019, sch 4, cl 4.1(a).

⁵ Clause 4.1(b).

Remedies

[15] If Dr Caddy was unjustifiably dismissed, what (if any) remedies should be awarded? In particular:

- (a) Is reinstatement practicable and reasonable?
- (b) Is Dr Caddy entitled to compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act)? If so, at what level?
- (c) Is Dr Caddy entitled to reimbursement for lost wages? If so, how much?

Disestablishment of position

[16] Section 103A(2) of the Act provides that the test for justification is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred. While the Court may inquire into the merits of a redundancy business decision, the inquiry is directed at ensuring that the decision, and how it was reached, were what a fair and reasonable employer could have done in the relevant circumstances.⁶

[17] Once that is established, if an employer concludes that the employee's position is surplus to its needs, the Court is not to substitute its business judgement for that of the employer.⁷

Background

[18] The School of Music is in the Faculty of Creative Arts and Industries at the University of Auckland.

⁶ *Grace Team Accounting Ltd v Brake* [2014] NZCA 541, [2015] 2 NZLR 494, [2014] ERNZ 129 at [84].

⁷ *Innovative Landscapes (2015) Ltd v Popkin* [2020] NZEmpC 40, [2020] ERNZ 55.

[19] Dr Caddy was employed by the University in July 2009 as a musicologist in the School. At the time her employment ended, she was a Senior Lecturer and shared the role of Associate Dean/Research in the Faculty.

[20] Musicology is a discipline within the School. It is the study of music from a variety of historical, intellectual, socio-cultural and theoretical/analytical perspectives. At the University at the time, Musicology also embraced Music Education (a form of teacher training). The other disciplines within the School are more practical in nature and include Classical Performance, Composition, Jazz and Popular Music. Musicology is a compulsory element of the Music degree, even for students on the performance path.

[21] A review of the School of Music took place in 2017. It was the University's practice to undertake regular school reviews. The last review for the School took place in 2002. Music was not singled out – other schools within the faculty were reviewed in the two years leading up to, and immediately after, the review of Music.⁸

[22] The procedures to be followed for reviews, including key questions for consideration, are set by University policy. The review evaluated the academic programme, the teaching of the programme and research within the School.

[23] An outcome of the review was that the current degree structure was found to be insufficiently flexible. It recommended the development of a broad Bachelor of Music (BMus) with a structure that provided greater room for interdisciplinarity. It advised that there be a unified first year experience that integrated all specialisations and recommended an expansion of capacity in Music Education and a focus on engagement with Māori and Pasifika communities.

[24] The School then formed a committee to redesign the curriculum. Dr Caddy was part of that committee. That redesign was approved in January 2018, with a new BMus to commence in 2019.

⁸ Dance was reviewed in 2015, Architecture and Planning in 2016, Music in 2017 and Fine Arts in 2018.

The restructure proposal

[25] In March 2018 the University put forward a consultation document proposing a new structure for the School. It proposed to:

- (a) create two new academic disciplinary areas (Music Education and Music Technology);
- (b) create 11 new positions (9.5 FTE) to support agreed priorities for the School;⁹
- (c) maintain 23 roles (21.3 FTE); and
- (d) disestablish seven roles (7 FTE of which two were at that time vacant).¹⁰

[26] The stated strategic objectives of the proposal were addressing the action areas identified in the 2017 review, aligning the school staffing with the redesigned BMus curriculum, supporting areas of growth (Popular Music, Jazz and Composition), reflecting a changing student demographic, increasing post-graduate international enrolments, achieving financial sustainability, and reducing the need for casual and fixed-term appointments.

[27] Dr Caddy says she does not take issue with the need for a restructure per se. She was also very supportive of the new vision for the School and the degree. It is how the proposal impacted the discipline of Musicology, and her position in particular, that she takes issue with, as well as how the University went about the process.

Proposal for Musicology

[28] The number of undergraduate students enrolling and majoring in Musicology had been declining for five years. It had picked up in 2017, bringing the total students enrolled to 32. However, the number of enrolments for 2018 was again low (10).

⁹ FTE meaning full time equivalent.

¹⁰ One of these roles was held by Dr Caddy.

[29] Musicology had seven FTE staff. This meant the staff student ratio (SSR) was 1:4.6. This did not, however, take into account that Musicology was compulsory for students in the BMus (whatever their major), and many students outside the BMus also took Stage 1 Musicology, which meant that staff taught significantly more than 32 students. Musicology staff were also largely responsible for teaching Music Theory.

[30] The restructure proposal recommended a number of changes in relation to Musicology that:

- (a) consistent with international best practice, undergraduate Music Theory teaching be delivered by the Composition/Theory disciplinary area;
- (b) Musicology be removed as a major but offered as a portfolio specialisation, remaining a core part of the degree but having a broader range of staff teaching it;
- (c) seven roles be reduced to four, two of which would be shared with other disciplinary areas:
 - (i) 0.5 FTE of a Senior Lecturer be allocated to support Classical Performance;
 - (ii) 1.0 FTE Associate Professor role move into the new Music Education area; and
 - (iii) 0.5 FTE of an Associate Professor be allocated to support the proposed music education area.
- (d) the three remaining positions be disestablished due to overlaps and reduction in student numbers:
 - (i) Senior Lecturer (held by Dr Caddy),
 - (ii) Lecturer (held by Dr Gregory Camp); and

(iii) Professional Teaching Fellow.

The consultation process

[31] The University held pre-consultation meetings with the Tertiary Education Union (TEU) before the restructure proposal was released.

[32] School staff were notified via email on Thursday 15 March 2018 that a consultation process would start the following week on Monday 19 March 2018. They were told that impacted employees would be contacted later that day and a meeting set up with them as individuals to take place on Monday before the full staff meeting.

[33] As an affected employee, a meeting was held with Dr Caddy on 19 March 2018 to present and explain the proposal. The TEU was present. A meeting was held later that same day with all staff. Neither meeting went well. Staff were upset and angry at what they saw as a failure to involve them in the proposal development process.

[34] Feedback was sought on the proposal and one month given for submissions, which was later extended by two weeks. A further meeting was held to answer any questions. An FAQ sheet was provided by the University.

[35] Meetings about the proposed restructure were not comfortable and there was a high level of animosity among the staff.

[36] Some further information, although not all, was provided to the TEU as requested.

[37] There were 22 submissions; these were substantial (400 pages). Each disciplinary group, including Musicology, put forward its own submissions, as well as a number of individuals and the TEU. Dr Caddy's personal submission was 165 pages.

[38] The TEU opposed the proposal, concerned that it was inconsistent with the outcomes of the review, had not been developed in consultation with staff, and on that basis was fundamentally flawed. The Musicology discipline as a whole recommended that the proposal not be taken further and no staffing changes take place.

[39] The submissions were extensive and thoughtful, and included material from a number of sources including interested third parties. They were provided in full to the Restructure Review Committee which was made up of five people including an external expert, and chaired by Professor John Morrow, the Deputy Vice-Chancellor (Academic) at the University.

[40] The original Committee comprised three people but was expanded to include two additional members in response to a request from the TEU – Associate Professor Caroline Daley, Dean of Graduate Studies, who had been suggested by the TEU and Professor David Mackay as an external panel member. Professor Mackay had held a number of positions including Acting Dean of Architecture and Design and Deputy Vice-Chancellor (Academic) at the Victoria University of Wellington, Chair of the New Zealand Music Board and Chair of the Board of the Academic Quality Agency for New Zealand Universities.

[41] Ahead of their first meeting, the Review Committee was also provided with a summary review report by Ms Stefanie Boyer, the Human Resources Manager for the Faculty of Creative Arts and Industries.

[42] The Committee met twice, working through the issues raised by the submissions, guided by their terms of reference. Three Committee members gave evidence. They said their discussions were robust; they took significant time to consider the submissions, assess further information provided and reach a set of recommendations. They say key issues and themes were discussed at length and each role that was proposed to be impacted was also individually discussed. The Committee received further information from Associate Professor Rummel, Head of the School of Music. A set of recommendations was then prepared from their discussions and conclusions to be presented to the Vice-Chancellor.

[43] In total, the Review Committee recommended 15 changes to the original proposal. These were provided to the Vice-Chancellor and then discussed with him on 28 May 2018 at a meeting at which they were all present. The Vice-Chancellor accepted these proposed changes and prepared and approved a confirmation document.

[44] Key recommendations from the Review Committee which impacted Dr Caddy and Musicology were:

- (a) That a new role of Lecturer/Senior Lecturer in Music Studies be added. The role was “to contribute to undergraduate and postgraduate courses and supervision in areas such as classical and jazz theory and history, 20th and 21st century styles and techniques. It would also contribute to the School’s supervisory capacity.”
- (b) That staff be organised within two broad groupings of Creative Practice (incorporating Classical, Composition/Theory, Jazz and Popular Music) and Music Studies (incorporating Music Education, Music Studies and Music Technology) with Musicology coming under Music Studies.
- (c) That 0.5 FTE of the Associate Professor (Musicology) role not be allocated to Music Education and that it remain with Musicology (now Music Studies).
- (d) That, as initially proposed, the roles of Senior Lecturer,¹¹ Lecturer and Professional Teaching Fellow in Musicology be disestablished.

[45] Individual meetings were held with employees directly impacted by the restructure (including Dr Caddy) prior to the confirmation document being released to the broader staff group. Dr Caddy brought her partner, Chris Bradley, and Associate Professor Allan Badley with her as support people. She was understandably upset that her current role was confirmed as disestablished and while pleased that an additional Music Studies role had been created, she was distressed at the thought of having to compete for that position with her colleague, Dr Camp.

¹¹ Dr Caddy’s position.

Was the disestablishment of Dr Caddy's position substantively justified – are there genuine reasons?

[46] There were a number of reasons put forward by the University as justifying the broader restructure and ultimate disestablishment of Dr Caddy's position. These were to address the priorities as identified in the 2017 review, to align the School staffing with the redesigned BMus curriculum, to support areas of growth, to reflect a changing student demographic, to increase postgraduate international enrolments, to achieve financial sustainability and to reduce the need for casual and fixed-term appointments.

[47] The School of Music had been in deficit for some years. It had budget shortfalls ranging from \$43,000–\$530,000 over the previous seven years with an average annual loss of \$254,000 although this did appear to be slightly improving. This meant that the University had to provide additional financial support in the form of extension funding. The situation was not sustainable.

[48] The introduction of the new curriculum in 2019 required two new disciplinary areas to be created – Music Education and Music Technology – and the broadening of Composition to include Composition and Music Theory. It required new appointments to these areas.

[49] This meant the School had to make sufficient savings to consolidate its budget and halt the loss, and also meet the cost of new appointments. Given the state of the budget, it was proposed that the cost be met by realigning and reducing the current staffing.

[50] I consider that the above are all good reasons for change.

[51] Dr Caddy agreed that the ongoing deficit situation was unsustainable and unacceptable. She did not take issue with any of the strategic objectives. However, in her view the proposal failed to meet those objectives. She considered that the reduction in staff would put the ability to teach the degree at risk. Her concerns lie with particular elements of the reasoning that led to the decision to reduce staffing and in particular to disestablish the three roles in Musicology.

The use of EFTS

[52] University revenue is primarily generated by government funding and tuition fees based on the number of students enrolled – equivalent full-time students (EFTS). An EFTS is a measure that essentially translates a student into a financial unit.

[53] The University distributes the revenue by giving each faculty a budget based on a ratio of the number of EFTS enrolled in the various disciplines versus the number of FTE staff.

[54] The Dean, as head of the faculty, then breaks the faculty budget into School budgets. Once the School has its budgeted income, it calculates its salary budget based on its EFTS, using a staff to student ratio (SSR) formula – different ratios are applied to different disciplines. It determines how many staff members that funding can support. It also decides how to deploy those staff across the courses it has decided to offer. At that point it is not simply about EFTS or SSRs; there is an element of discretion.

[55] The SSR for the School of Music was 1:11.6, compared to 1:18 in Architecture and Planning and 1:23 in Fine Arts. Musicology had an SSR of 1:4.6.

[56] Based on academic benchmarking against a group of eight universities, the proposal document suggested movement to a ratio of 1:14 which would have meant that the School was overstaffed by six FTEs.

[57] Dr Caddy took issue with the use of EFTS as part of a measure to establish an appropriate SSR, as they did not take into account the workloads of the staff in question. Musicologists, for example, taught the largest classes. She proposed that EFTS in Musicology be counted not only based on the EFTS enrolled in the major, but the number of students taught in core and elective Musicology courses. She argued that rather than 32 EFTS, Musicology should be regarded as having closer to 200.¹² Looked at in that way, Musicology would have exceeded the target of an SSR of 1:14 and no redundancy would be justified.

¹² 155 for Musicology and 45 for Music Theory.

[58] Further, she was concerned that by relying on EFTS alone, the University was failing to look at the realities of who would teach the courses in the new BMus.

[59] It is correct that the use of EFTS is a relatively blunt instrument. However, I do not consider that it was used in isolation. The recommendations of the Review Committee demonstrate that it considered the concerns raised by Dr Caddy and others about the ability of the proposed structure to deliver the required teaching. The Committee reviewed the teaching requirements under the new BMus curriculum and the workloads of staff under the proposed model. On that basis, the Associate Professor role that was going to shift out,¹³ stayed where it was, and it recommended the creation of the additional role of Lecturer/Senior Lecturer in Music Studies.

[60] It was satisfied that with the retention of the Associate Professor role and the addition of the new role, there would be sufficient academic expertise to cover the teaching of the new curriculum. Consistent with the aim to move to increased interdisciplinarity, it also noted that it would be advantageous to move towards a team teaching approach in many courses which would provide greater flexibility for cover.

[61] Accordingly, while an important factor in the first step of the analysis, EFTS were not the only factor in the allocation of staff to various areas.

[62] The School had an average of just over 400 students per year. Each of those students has a limited amount of funding attached to them. If the numbers for Musicology are inflated on the basis of the number of students taught at Stage 1, as suggested by Dr Caddy, the EFTS allocated to other disciplines would necessarily have to be reduced. It is a balancing exercise.

[63] On their face, EFTS were indicating that there was too much staff resource allocated to Musicology and not enough to Jazz and Pop which was the growth area. I accept the University's argument that the analysis of the EFTS indicated that the staffing resources needed to be rebalanced. Had that been the end of the analysis, I would agree with Dr Caddy that they were not a sufficiently nuanced tool when

¹³ See [44(a)] and [44(c)] above.

looking at a whole of School restructure through the lens of the stated strategic objectives.

[64] As set out above, however, the initial restructure document and, in particular, the Committee's analysis of that proposed restructure in the context of the submissions received and their subsequent recommendations, looked at more than just EFTS.

International practice

[65] In the proposal document, international practice was relied on to justify shifting the teaching of Theory from Musicology to Composition.

[66] Professor Hudson, an expert called by Dr Caddy, gave evidence that the opposite was the case. In her experience the discipline of theory sits firmly within the field of Musicology;¹⁴ it was developed by musicologists. She says that the relationship between Musicology and analysis means that musicologists are steeped in music theory which enables them to play a major role in postgraduate supervision, often in collaboration with performers or composers.

[67] It was apparent by the end of the hearing that caution is required when relying on international practice as it varies significantly, depending on where you look and who you talk to.¹⁵ With schools of music, it varies depending on whether the conservatoire model or the academic school of music model is operated.

[68] Professor Hudson herself accepted that there was no single model of teaching theory internationally.

[69] Accordingly, I did not find international practice to be a compelling justification for change.

¹⁴ Professor Hudson is an expert in the field of Musicology and Dean of the College of Arts, Media and Design and Professor of Music at Northeastern University in Boston Massachusetts.

¹⁵ Dr Caddy, in her submission, noted that it was apparent that there was a mix of teaching practices at PAMS (Pacific Alliance of Music Schools – eight Australian Music Schools) in relation to which discipline teaches theory. In some, composers teach Theory, in some, Musicology, and in others, a mix.

[70] That said, by the time the final decision was confirmed, the University did not appear to be continuing to rely on international practice as a justification other than for benchmarking. The Review Committee noted the concerns around differing international practice as well as around the risk of reinforcing disciplinary silos. It considered that by organising the staffing under two broad groupings,¹⁶ it would encourage interdisciplinary work and collaboration.

[71] After considering the submissions, the Review Committee agreed that it was appropriate for Music Theory to be aligned with the Composition disciplinary area but determined that the teaching of it would be a shared responsibility across all disciplinary areas with both Composition and Musicology containing significant responsibilities.

[72] This reasoning is sound and consistent with the broader strategic objectives of the restructure.

Taking Professors and Associate Professors out of scope

[73] The restructure proposal proposed that the Associate Professor and Professor positions in Musicology be ringfenced and taken out of scope on the basis that these positions contributed significantly to the School's international research profile and doctoral supervision, as well as being expected to undertake significant service and leadership roles.

[74] This was accepted by the Review Committee and the removal of them from the scope of the restructure was confirmed. Professors Mackay and Morrow noted that the only person to comment on that aspect of the proposal in the submissions was Dr Caddy.

[75] Given the recommendations and student numbers within the discipline, Dr Caddy submits that taking these positions out of scope meant that the disestablishment of the three roles of Senior Lecturer (held by her), Lecturer and Professional Teaching Fellow, became almost inevitable. She argues that in the absence of any consideration

¹⁶ Creative Practice and Music Studies.

or assessment of the research the professoriate were actually undertaking, it was unjustified to not consider them when it came to the disestablishment of musicologists.

[76] Her point is that given her own significant research experience, contribution and publication history which has been subsequently proven through the attainment of a Performance-Based Research Fund (PBRF) rating of A,¹⁷ together with her experience in doctoral supervision she would have compared favourably to the individuals in those roles. No doubt she is correct. She is an excellent academic.

[77] The University argues that it was justified in excluding these roles due to the status and standards applying to those roles. It says that it was critical to maintain academic leaders as part of the restructure. It says that Dr Caddy's argument would require it to look at the people and performance, not the positions they held. It says it was the positions it was focusing on.

[78] The Collective Agreement recognises the roles of Associate Professor and Professor as specific roles with unique conditions. The retention of academic leadership was a decision available to the University.

[79] Accordingly, the University had genuine and reasonable reasons for taking the professoriate out of scope. The decision to focus on positions as opposed to people is justified.¹⁸

Relevance of subsequent events

[80] Finally, Dr Caddy has sought to rely on the subsequent events following her redundancy to illustrate that the decision to make her role redundant was not justified. There is evidence suggesting that the changes considered in the Consultation Document have not been brought to fruition with little change in the operation of the School of Music. There was also evidence given that Dr Camp is now operating under an increased workload and had not yet taught Jazz. Dr Caddy claims this outcome

¹⁷ She does not suggest that the PBRF rating itself should be taken into account (which would be in breach of PBRF Fund and Use of Information Policy); she referred to it as objective proof of her performance being comparable to that of an Associate Professor or Professor.

¹⁸ *New Zealand Fasteners Stainless Ltd v Thwaites* [2000] 2 NZLR 565, [2000] 1 ERNZ 739 at 747.

was predictable and is illustrative of the lack of justification in the redundancy decision.

[81] It is clear that there have been issues in the implementation of the restructure. That is hardly surprising given the nature and extent of the exercise. The ongoing effects of the COVID-19 pandemic are also cited by the University as contributing to the delays in the transition.

[82] Professor Brand, the Dean of the Faculty of Creative Arts and Industries, gave evidence that Jazz History will now be taught every second year as part of the BMus curriculum. Efforts are being made to reduce Dr Camp's workload by having him step down as Director of Postgraduate Studies. On the whole, Professor Brand claims the restructure and redesigned curriculum have been successful in achieving their desired outcomes.

[83] As has been discussed, the s 103A test is to be guided by what a fair and reasonable employer could and would have done in the circumstances. Care should be taken in 'crystal ball gazing' when applying this objective test. Even if relevant events may later come to light or the employer may consider that there were other grounds for the dismissal based on things known at the time, these cannot affect considerations of justification for dismissal.¹⁹ Only in situations where significant negative consequences would have been apparent to a fair and reasonable employer at the time of the decision, would there be an argument that subsequent events should form a part of the assessment of justification.

[84] The redundancy decision was based on a detailed and comprehensive process. I accept that the fundamental changes it encompassed were not without risk and are not changes that would occur overnight or without teething issues. I also accept that the current environment would further frustrate these changes. Even if Dr Caddy did correctly predict consequences of the decision, I do not agree that they were foreseeable or significant enough that the justification for the decision is impugned.

¹⁹ *X v Auckland District Health Board* [2007] 1 ERNZ 66 (EmpC) at [98].

Conclusion

[85] I am satisfied that the test of justification set out in s 103A(2) has been met and the decision to proceed with the redundancy was one open to a fair and reasonable employer in the circumstances.

[86] The University has established that Dr Caddy's position was surplus and it had genuine reasons for the disestablishment of her role. The Court is not to substitute its business judgment for that of the employer.²⁰

[87] Its decision was substantively justified.

Was the process followed to disestablish the position fair and reasonable?

[88] As set out in *Grace Team Accounting*,²¹ if an employer can show a redundancy is genuine and the consultation requirements of s 4 of the Act have been complied with, then that could be expected to go a long way towards satisfying the s 103A test.

[89] I have found that the redundancy is genuine.

[90] The process followed by the University is set out at [31]–[45].

[91] The process to be followed in the event of a proposed surplus is set out at cl 4.1(a) of sch 4 to the Collective Agreement:

Where the employer carries out a review or restructure of any of the positions covered by this agreement, and such a review or restructure has the potential to affect the job security of any employee covered by this agreement, the employer will enter into a process of consultation with the union(s) and the affected employee(s). Such consultation shall commence as early in the process as possible, and at least one month prior to any final decisions being made provided that in specific instances this period may be reduced by mutual agreement with the union(s) and employee(s) concerned. The purpose of such consultation is to allow the parties sufficient opportunity to investigate options in good faith which would prevent any loss of employment.

[92] Those obligations are consistent with the requirements under the Act.

²⁰ See *Innovative Landscapes*, above n 7.

²¹ *Grace Team Accounting Ltd v Brake*, above n 6.

[93] I consider that the University met its obligations under the Collective Agreement. Having met with the TEU beforehand, the University put forward a proposal to restructure the School of Musicology. It met to discuss the proposal both individually with Dr Caddy (and other affected individuals) and with the broader group. It answered questions, provided information and invited feedback and submissions. It was required to give employees four weeks to provide submissions or feedback but extended that time period to six weeks. It seems that the employees fully utilised the opportunity to comment.

[94] It set up a Review Committee to analyse and consider those submissions. It added to the members of the Committee to meet concerns raised by the TEU and staff. The Committee read and considered 400 pages of submissions, 165 pages of which were provided by Dr Caddy. The evidence of the Committee members was that they took that responsibility seriously. They say they had robust discussions as they worked through the material. They considered key themes, areas of concern and looked at each affected position individually.

[95] They made 15 recommendations for change to the proposal as a result of the submissions. These recommendations were accepted by the Vice-Chancellor and a final confirmation document was prepared and approved.

[96] The University met one-on-one with Dr Caddy to advise her of the outcome.

Was sufficient information provided?

[97] Dr Caddy says that inadequate information was provided as part of the consultation process. She says there was a lack of budget information and despite asking for it, no staffing plan around how the programme would be taught, moving forward, was ever given.

[98] Dr Caddy says that had she been given fuller financial information, she might have been able to suggest alternative ways money could have been saved. In relation to the staffing plan, this was given to the Review Committee for its deliberations, but

not staff. Having now seen this, Dr Caddy still says it is insufficient but considers it unfair that staff were not given an opportunity to comment on it.

[99] The University says sufficient information was provided to Dr Caddy in relation to the budget in the consultation document including the end of year budget figures for seven years, funding extensions and the costs of casuals and fixed-term appointments. I agree. I consider there was sufficient information for Dr Caddy to investigate options. She was able to provide a comprehensive submission.

[100] The University also says the information Associate Professor Rummel compiled for the Review Committee (on proposed revised structure, mapping against curriculum) occurred after consultation had closed and was not available earlier as student numbers were not yet available. The University says it was designed to test the feasibility of a draft staffing model, developed after (and in response to) the receipt of submissions and once decisions were being made about future roles.

[101] I accept that the student numbers and therefore a forward work plan was not available when requested during the consultation. This was a working document for the Committee generated in response to the submissions. I do not think it was incumbent on the University to then consult on it.

Should the University have consulted on the position description?

[102] Dr Caddy also took issue with the consultation round the formulation of the position description for the new Music Studies position. She submitted that Associate Professor Rummel and Ms Boyer had drafted the position description without consultation.

[103] In her evidence, Ms Boyer disagreed that reconsulting was necessary as the new Music Studies position was the result of the extensive consultation undertaken and the feedback given by staff. This included feedback from Dr Caddy and the Musicology group submission that further resources would be required in Musicology, the Jazz group submission that there was a strong core team but not enough staff to

cover research and study leave, and suggestions made by Associate Professor James Tibbles that there be a combined Musicology/Jazz role.²²

[104] As Head of School, it was appropriate that Associate Professor Rummel be asked by the Review Committee to create the new position and formulate a position description. The willingness to create the new position is reflective of the serious and open-minded manner in which the University engaged in the consultation process. I do not think it was incumbent on them, having engaged with and then acted upon the suggestions made, to then consult Ms Caddy on the content of the position description.

[105] If I am wrong about that, I would still have found that any procedural defect was minor and did not result in any unfairness to Dr Caddy.²³ The position description's inclusion of the Jazz specialisation was reflective of the wider strategic objectives of the restructure and the submissions of the Jazz group and Associate Professor Tibbles. I do not believe that any further consultation with Dr Caddy would have led to any substantial changes to the job description in her favour.

[106] This was a comprehensive consultation process. There were no deficiencies giving rise to an unjustifiable action or disadvantage.

Redeployment

[107] Having established that the restructuring process that led to the disestablishment of Dr Caddy's position as Senior Lecturer of Musicology was substantively and procedurally justified, the analysis turns to the issue of redeployment and the questions identified at [13].

The position description

[108] The Confidential Confirmation Document set out the establishment of two new roles: Lecture/Senior Lecturer in Music Studies and Lecturer/Senior Lecturer in

²² Associate Professor Tibbles also expressed concerns about the potential loss of both the Senior Lecturer and Lecturer in Musicology and the consequences this would have for growth in that area.

²³ Section 103A(5).

Music Education. Dr Caddy says she recognised she did not have the required teaching or research experience for the Music Education role but that she could apply for the new Music Studies position. At the meeting of 6 June 2018, after the confirmation that Dr Caddy's current role would be made redundant, Associate Professor Rummel asserted that this new job would be open to her and Dr Camp and that a neutral process would be followed.

[109] The position description for the Music Studies role annexed to the Confirmation Document describes the role as one “[specialising] in Music Studies and Jazz Studies”. This is a source of contention for Dr Caddy who had no previous experience lecturing or tutoring in Jazz Studies. Dr Camp, for his part, had considerable teaching experience in Jazz Studies. This led her to the conclusion that the role had been tailored to better suit Dr Camp at her expense.

[110] In support of this view, Mr Mitchell, counsel for Dr Caddy, drew attention to an earlier version of the description which had been provided to the Review Committee. That version can be fairly described as of a more general nature than the one that was eventually presented in the Confirmation Document. It does not include the specialisations in Music Studies and Jazz Studies in the job title as the later document did. However, those specialisations are still clearly set out as being key to the role in the older document.

[111] The comparison between these documents does not reveal a significant change in terms of the Jazz Studies specialisation requirement. The only substantial change is that the specialisation already present in the body of the document became part of the position title. The position description in the Confirmation Document was certainly more detailed and developed but it did not add any substantial extra weight to the Jazz Studies specialisation.

[112] The inclusion of the Jazz Studies specialisation is consistent with the wider strategic objective of supporting areas of growth, which included Jazz alongside Popular Music and Composition. In that context, I do not believe it can be readily inferred that the Jazz Studies specialisation was designed to favour or frustrate a

particular candidate. Rather, it was reflective of the wider strategic reorientation of the School and its offerings.

Collective Agreement - Redeployment

[113] Schedule 4 of the Collective Agreement sets out the provisions relating to redundancy and redeployment. It sets out consultation requirements and notes that the purpose of this consultation is “to allow the parties sufficient opportunity to investigate options in good faith which would prevent any loss of employment.”²⁴

[114] Clause 4.1(b) of the Schedule sets out redeployment obligations as follows:

The University’s approach to surplus situations shall be to explore the possibility of using redeployment, retraining and/or early retirement. Where reasonable efforts to place surplus staff through these options prove unsuccessful redundancy provision may be invoked.

[115] The Collective Agreement refers to the Review and Restructure Policy and Procedures which sets out processes relating to redeployment in greater detail. Where a “many to few” situation existed, it sets out that all directly impacted incumbents were to be given preferential consideration for any new roles/s and that the appointment process would be based on merit. Decisions would be based on the requisite skills and competencies required for the role.

[116] The redeployment obligations and policies are largely reflective of the development of the common law obligations with regard to redeployment.²⁵

Obligation to avoid redundancy

[117] Staff in disestablished positions were to receive a “redeployment pack” with information on completing an expression of interest form (EOI). Ms Boyer sent an email outlining the EOI process for the new roles on 6 June 2018, the same day as the confirmation meeting took place. Dr Caddy responded on 13 June 2018 with an EOI form, expressing interest in the Music Studies role. Initially, on 7 June 2018, Dr Camp

²⁴ Clause 4.1(a).

²⁵ *Wang v Hamilton Multicultural Services Trust* [2010] NZEmpC 142, [2010] ERNZ 468; *Jinkinson v Oceana Gold (NZ) Ltd (No 2)* [2009] ERNZ 225 (EmpC).

responded, expressing interest only in the Music Studies role. He subsequently submitted a second EOI form on 11 June 2018 which expressed an interest in the Music Education position.

[118] Dr Caddy considers her redundancy could have been avoided if Dr Camp had been appointed to the Music Education position.

[119] Professor Morrow (who was Chair of the Restructure Review Committee) explains that Music Education involves the study of the pedagogy of music teaching, an area in which Dr Camp had no experience. He says the expected demand in that area required the appointment of a sub-disciplinary specialist with a doctorate in Music Education and that the Review Committee viewed a doctorate as critical to:

- (a) the delivery of high-quality teaching and research;
- (b) the credibility of the role; and
- (c) the successful candidate being able to supervise doctoral students.

[120] On 8 June 2016 Associate Professor David Lines sent an email to Associate Professor Rummel and Ms Boyer suggesting that the selection criteria for the Music Education position could be reconsidered, as “sometimes the right person can be under your nose, so to speak.” The email, which refers to Dr Camp, received support from Associate Professor November and likely led to Dr Camp’s second EOI expressing interest in the Music Education role.

[121] This led to further discussions between Ms Boyer, Associate Professor Rummel and Professor Brand. Ms Boyer says they were aware that this was a potential opportunity to minimise redundancies. However, those involved in the discussion remained of the opinion that Dr Camp would not be an appropriate appointment in that position.

[122] An EOI review panel was appointed by the Dean on June 2018 to review the EOI forms and make recommendations to the Dean on next steps. It included Associate Professor Rummel as Head of School, Associate Professor James Tibbles as

Deputy Head of School and Associate Professor Julia Gatley as a representative of the CAI Faculty Staffing Committee. The panel recommended proceeding to interview Dr Caddy and Dr Camp for the Music Studies position but unanimously agreed that Dr Camp was not suitable for the Music Education position. All of this was approved by the Dean.

[123] The same position was taken by the EOI Review Panel. The reasons for this were said to go beyond the fact that Dr Camp did not have a doctorate, although that was a significant factor.

[124] The decision not to consider Dr Camp for the Music Education role is criticised by Dr Caddy. It is submitted that the redeployment obligations set out in the Collective Agreement and the Review and Restructure Policy and Procedures required the Court to be satisfied that there were no other options available to avoid the redundancy. Had Dr Camp been appointed to the new Music Education role, Dr Caddy could have been appointed to the Music Studies position.

[125] Ms Boyer points out in her evidence that Dr Camp's publication record was in Musicology, not Music Education; he had no Ministry of Education teaching certification or experience at the primary or secondary level (as noted under preferred qualifications/experience in the position description); and he had no conference papers or professional networks in the field of Music Education.

[126] Professor Morrow accepted in his evidence that the appointment of Dr Camp would have met the needs of Dr Caddy, but it would not have met the needs of the School and the students. I accept this was a decision open to a fair and reasonable employer and was not a breach of the Collective Agreement and associated policies. It is somewhat telling that Dr Caddy, whose academic background was not dissimilar to Dr Camp's, did not regard the Music Education role as one that she was suitable for.

[127] I am satisfied that the University investigated in good faith redeployment opportunities that would have prevented any loss of employment for both Dr Caddy and Dr Camp. The outcome was that Dr Camp was not suitable for the Music Education role.

[128] This left Dr Caddy and Dr Camp to contest the Music Studies position.

The selection process

[129] The Review and Restructure Policy and Procedure sets out that the selection criteria were to include skills and capabilities outlined in each relevant position description and that shortlisting, assessments and interviews would be based on those criteria.

[130] It also sets out that the selection methods were to include one panel interview and all preferred applicants would then be reference checked. At least one reference was to come from an existing or former manager from within the University. This interview and reference process was followed in respect of Dr Caddy and Dr Camp.

[131] A Redeployment Interview Panel was established to conduct the interviews for the Lecturer/Senior Lecturer in Music Studies role, which were held on 20 June 2018. The members of the panel, approved by the Dean, were:

- (a) Associate Professor Rummel (Head of School);
- (b) Associate Professor Gatley (Faculty Staffing Committee representative);
- (c) Associate Professor Badley (Associate Dean – Strategic Engagement, representative from Musicology);
- (d) Mr Ron Samsom (Senior Lecturer – representative from Jazz); and
- (e) Ms Boyer (HR Manager).

[132] An interview guide was developed in consultation with the Redeployment Panel and was based on the standard recruitment template. Each member of the Redeployment Panel was assigned questions to ask the candidates and was provided with a scoring sheet. Before the interview commenced, they discussed the background to the role being created and the process for how the interview would proceed. The

panel members were reminded of the need to avoid bias and ensure that the process was fair.

[133] On completion of the interviews, the Redeployment Panel was to collectively discuss and reach agreement on scores out of four for the candidates across five key areas:

- (a) Qualifications and background;
- (b) teaching and supervision capabilities;
- (c) research capabilities;
- (d) service capabilities; and
- (e) leadership framework capabilities.

[134] The individual scoring sheets allowed each of the 13 questions prepared for the interview to be scored out of three – one being that the candidate failed to meet requirements, two being that they met the requirements and three being that they exceeded the requirements. These individual scores were to be discussed and fed into the Redeployment Panel's overall decision. The individual scores were not determinative of the outcome of the selection process.

[135] Five of the 13 questions are clearly jazz-oriented. Dr Caddy describes desperately trying to recount the occasions on which she had encountered jazz in her research and teaching. Mr Mitchell submits that the questions used by the panel were not neutral. He says it was well-established that Dr Camp was the candidate who had more significant experience in Jazz Studies. He says that those questions provided significantly greater opportunity for an academic with jazz teaching and research experience to address the issues in the questions.

[136] Inasmuch as that was the case, I do not believe this leads inevitably to the conclusion that the interview process was not neutral or had been weighted in Dr Camp's favour. The position description clearly sets out a role which required the

ability to teach jazz. As I noted in the discussion of the position description, I do not take the focus on jazz to have been a deliberate attempt either to favour Dr Camp or to sabotage Dr Caddy. The reality is that the increased focus on jazz accorded with the wider strategic objectives of the overall restructuring. The presence of a significant number of questions about jazz is simply reflective of the position description and the overarching strategic objectives.

[137] It should also be noted that both Dr Caddy's and Dr Camp's qualifications for teaching Music Studies appear to have been relatively well-established which may go some way towards explaining why jazz was given a heavier focus.²⁶ Ms Boyer also notes that the Redeployment Panel were aware of Dr Camp's recent Jazz Studies teaching experience and made efforts to ensure the process was equitable. She says that Mr Samsom reiterated to the Redeployment Panel the contribution that had been made by both candidates to the Jazz programme.

[138] Dr Caddy was interviewed first, followed by Dr Camp. The interviews took approximately one hour.

[139] The evidence of both Associate Professor Gatley and Ms Boyer was that Dr Caddy interviewed well but could be indirect or unfocused in her answers. However, both agree that Dr Camp interviewed exceptionally well and gave clear and concise answers. Both describe the decision that followed as being difficult.

[140] Following the interviews, the Redeployment Panel discussed the candidates and their respective strengths in order to assign scores out of four in the five key categories. After a lengthy discussion, it was decided that Dr Camp would receive full marks in respect of all five categories, a score of 20/20. Dr Caddy was awarded 19/20, losing one mark on the leadership capabilities framework based on her performance and examples given in the interview.

²⁶ In the individual scoring of the Redeployment Panel, Dr Camp was marked higher on both jazz related and non-jazz related questions.

[141] Because the scores remained so close, the Redeployment Panel then totalled their individual scores for further discussion. Four of the panel members had scored Dr Camp higher than Dr Caddy; Mr Samsom scored them evenly.

[142] After further deliberation, it was unanimously decided that Dr Camp should be recommended for the role. Ms Boyer said the panel agreed that he had presented himself as the stronger candidate; had demonstrated a greater diversity across a variety of areas, including Jazz, Musicology and Vocal Performance; and had displayed both experience and interest in fostering engagement with Māori and Pasifika communities.

Criticisms of the Redeployment Panel

[143] Dr Caddy was critical of the membership of the Redeployment Panel assembled for the interview process. Mr Mitchell highlights that neither Associate Professor Gatley nor Ms Boyer had any experience in Music. He submits it is difficult to see how they could assess matters such as research quality and service without having any understanding of the research conducted by each candidate and some kind of assessment of their service.

[144] In their evidence both Associate Professor Gatley and Ms Boyer set out their considerable interviewing and recruitment experience. I am satisfied that both were well-qualified to be members of the Redeployment Panel. Other members of the panel brought expertise from within the School and there are benefits related to having an ‘outside perspective’.

[145] Dr Caddy also gave evidence about animosity that had previously arisen between herself and Associate Professor Rummel. In April 2017 Dr Caddy, along with a number of other staff members, had been involved in raising concerns about his conduct in his role as Head of School. A meeting was held where Dr Caddy was critical of what she described as his “obvious lack of understanding of the academic components of the degrees we offer and his lack of basic awareness of the academic work we undertook.” Dr Caddy was also critical of “the culture of mistrust and suspicion” he allegedly cultivated within the school. It appears Associate Professor Rummel received the backing of the Dean at the time.

[146] I do not accept that there was any bias or risk of bias on the part of Associate Professor Rummel. There is no evidence to suggest there was lingering animosity with respect to the events of April 2017, and his integral role in the restructuring meant it was appropriate that he was a member of the Restructuring Panel.

[147] I note that without his participation, the evidence and individual scores do nothing to suggest a different outcome would have been reached. In fact, the individual scores of the two members of the Redeployment Panel with whom Dr Caddy did not take issue, still combine to favour Dr Camp.

[148] Dr Caddy was also critical of perceived disparities in the individual scoring of the interview questions. For example, Associate Professors Rummel and Gatley show a far greater disparity than those of the other panel members.

[149] The individual scores reflect the panel member's subjective assessments of the candidates' responses to the interview questions. Such subjective criteria are not objectionable in and of themselves.²⁷ Importantly, these scores were not determinative of the Redeployment Panel's analysis. Rather, the panel's decision was based primarily on the unanimous scoring according to the five key competencies. The individual scores were supplementary to the discussion around those scores, and there was not a simple mathematical exercise where the candidate with the highest combined score was awarded the role.

[150] Finally, Mr Mitchell submits that a selection process based on one interview was not a reasonable way of determining the outcome of a redeployment opportunity. The process followed complied with the Review and Restructure Policy and Procedures. The decision was made after significant discussion among the members of the Redeployment Panel which were far from surface level. To accept Mr Mitchell's submission would be to impose on the University more onerous obligations, in terms of redeployment processes, than those set out and referred to in the Collective Agreement.

²⁷ *Bourne v Real Journeys Ltd* [2011] NZEmpC 120, [2011] ERNZ 375 at [124].

[151] The process utilised, and the decision made, were open to a fair and reasonable employer.

Further redeployment opportunities

[152] Dr Caddy submits that there were other options beyond those discussed above to avoid the redundancy. She points out the obligations under the Collective Agreement to retain staff where it was possible to do so. It is pointed out that she taught a wide range of classes across the School and that Dr Camp has apparently been teaching well in excess of his required teaching hours since her redundancy. It is submitted that the Court cannot be satisfied that there were no teaching opportunities available to both Dr Camp and Dr Caddy.

[153] As I have noted and accepted above, the strategic and financial rationale for the restructuring was substantively justified. The requirements of the Collective Agreement did not amount to the University being required to create a position for Dr Caddy where none was readily available.

[154] I also note that Ms Boyer gave evidence that she emailed Dr Caddy on three separate occasions, offering to meet with her to discuss outplacement and redeployment following the decision of the Redeployment Panel. Dr Caddy's response on 3 July 2018 was that she was considering various options. She did not take Ms Boyer up on her offer.

[155] I am satisfied that reasonable efforts were made to redeploy Dr Caddy, that there were no further suitable redeployment opportunities within the School, and that Dr Caddy was not interested in engaging with Ms Boyer about opportunities which may have been available elsewhere.

Conclusions

[156] There were genuine reasons for the disestablishment of the role held by Dr Caddy. It occurred in the midst of a comprehensive review and restructure of the School of Music and was necessitated by both the financial performance of the School

and the strategic objectives underlying the restructure. The redundancy decision was substantively justified.

[157] The process followed was one open to a fair and reasonable employer. If any defects were present, they were minor and did not result in Dr Caddy being treated unfairly. Any allegations of bias or inadequacy in the processes used are not established.

[158] The University investigated options in good faith that would have prevented the loss of employment for Dr Caddy. Reasonable efforts were made to redeploy Dr Caddy and she was given the opportunity to participate in the selection process for the new Music Studies role.

[159] The terms of the Collective Agreement and the Review and Restructure Policy and Procedures were complied with. There was no obligation to redeploy Dr Camp into the Music Education role that he was unsuitable for in order to facilitate Dr Caddy's continued employment.

[160] The University exhibited a willingness to discuss further outplacement or redeployment opportunities. As was her right, Dr Caddy chose not to engage in that discussion.

[161] As no unjustified dismissal has been established, there is no question of remedies.

[162] Dr Caddy's challenge is dismissed.

Costs

[163] Costs are reserved. In the event that the parties are unable to agree on costs, the defendant will have 14 days to file and serve any memorandum and supporting

material, with the plaintiff having a further 14 days to respond. Any reply should be filed within seven days.

Kathryn Beck
Judge

Judgment signed at 4.45 pm on 13 August 2021