



DECISION

Fair Work Act 2009

s.739 - Application to deal with a dispute

The University of New South Wales T/A UNSW Australia

v

National Tertiary Education Industry Union
(C2016/6136)

Educational services

COMMISSIONER JOHNS

SYDNEY, 28 FEBRUARY 2017

Application to deal with a dispute – engagement of teaching focussed academics.

Introduction

[1] This decision involves an application brought by The University of New South Wales (**UNSW/applicant**) under section 739 of the *Fair Work Act 2009* (**FW Act**).

[2] The Respondent is the National Tertiary Education Union (**NTEU/respondent**).

[3] The parties are covered by the *UNSW Australia (Academic Staff) Enterprise Agreement 2015* (**Agreement**). The Agreement was approved by the Commission on 6 August 2015. It will pass its nominal expiry date on 17 March 2018.

[4] In short, the dispute is about whether UNSW can advertise roles for, engage and then allocate duties to teaching focused academics (with the consequence that teaching focused academics commence employment with UNSW without a requirement for research, scholarship and creative production).

[5] The UNSW brought the application on 13 October 2016. It was the subject of conciliation on 25 October 2016, but the dispute remained unresolved. Consequently, the matter was programmed for arbitration.

The hearing and submissions

[6] At the hearing on 16 December 2016:

- a) the applicant was represented by Ms R Christmann, and
- b) the respondent was represented Ms J Wells.

[7] Submissions and evidence were filed prior to the hearing. Consequently, in addition to the submissions made during the hearing, the Commission, as presently constituted, has

also had regard to the following in coming to its decision in this matter:

- a) Form F10 – Application for the Commission to deal with a dispute in accordance with a dispute settlement procedure,
- b) Applicant’s Particulars (**Exhibit A1**),
- c) Applicant’s Submissions (**Exhibit A2**),
- d) The 2015 Agreement (**Exhibit A3**),
- e) Witness Statement of David Ward (as amended during the hearing) (**Exhibit A8**) (who was not required for cross-examination),
- f) Applicant’s Submissions in Reply (**Exhibit A9**),
- g) Respondent’s Submissions in Reply (**Exhibit R1**), and
- h) Respondent’s Objections to Evidence (**Exhibit R2**).

[8] The Witness Statement of David Ward was heavily amended during the hearing. Consequently, UNSW placed no reliance on the earlier versions of the Agreement nor on the history of the bargaining leading up to the Agreement. As a further consequence the Commission, as presently constituted, has not had regard to:

- a) *The University of New South Wales (Academic Staff) Enterprise Agreement 2011 (Exhibit A4)*,
- b) *The UNSW (Academic Staff) Enterprise Agreement 2006 (Exhibit A5)*,
- c) *The University of New South Wales (Academic Staff) Enterprise Agreement 2003 (Exhibit A6)*,
- d) *The University of New South Wales (Academic Staff) Enterprise Agreement 2000 (Exhibit A7)*.

Background

[9] Most of the facts in the matter are uncontested. The following is a summary of the background to the issues in dispute:

- a) In April 2016, UNSW’s Faculty of Engineering advertised a number of “Teaching Focused Academic Positions” on its website, in the School of Mechanical and Manufacturing Engineering, the School of Electrical Engineering and Telecommunications and the School of Chemical Engineering. Each of the positions was advertised on a full-time basis for a 3 year fixed term. Three of the four advertisements stated that “specific teaching arrangements be negotiated with the successful candidate”.
- b) On 2 May 2016 the NTEU wrote to UNSW (by letter dated 27 April 2016) about the teaching focused positions that were advertised. The NTEU wrote,
*“[The Agreement] does not include a category of employment labelled ‘teaching focused’. Schedule 3 stipulates that ‘all teaching and research academic staff will be provided with the opportunity to undertake the full range of academic duties, commensurate with the classification level to which they have been appointed.’
Furthermore, it is articulated in clause 24 on workloads that work allocated to teaching/research academics will be distributed equitably among all employees according to the local workload model, so we would interpret attempts to unequally distribute some staff members with more teaching than others as a potential breach of the [Agreement]. This clause stipulates that all work units would have a workload model that regulates the distribution of workload in a manner that is equitable, transparent, collegially developed and generally supported by employees covered by. It will be difficult to imagine a scenario whereby a new employee would have sufficient opportunity to apprise themselves of what is fair and equitable regarding workload allocation in their new place of employment and we would take a negative view of such new hires being engaged on the basis of ill-informed agreements to take on*

excessive teaching workloads.

The Agreement does allow that, at a given point in an existing employee's career, they may agree with their supervisor 'to perform a predominantly teaching or research role for a defined period' but such agreement should be genuine and not made under duress. Moreover, it is stipulated that 'in entering into any such agreement with an early career academic, the University will take into account the need for that employee to establish a research profile.'"

- c) On 6 May 2016 UNSW responded to the NTEU in the following terms,

"....

You should be aware that UNSW is not seeking to restrict staff from undertaking the full range of academic duties consistent with the Agreement. UNSW Engineering has simply invited applications from prospective candidates who favour a teaching focused position. As you indicate in your letter, schedule 3 of the Agreement also provides,

It is recognised that at a particular point in an academic career, an employee may agree with their supervisor to perform a predominantly teaching or research role for a defined period due to the performance strengths or preferences of the employee.

It follows that UNSW could legitimately negotiate and ultimately agree with any existing or prospective employee, a predominantly teaching or research position for a defined period consistent with the terms of the Agreement. You would be well aware that UNSW has employed staff in a research focused role for number of years without any concern being raised by the NTEU. Suggesting that UNSW is not able to have staff employed in a teaching only position within the parameters described by the Agreement would appear to be incongruous with existing arrangements that apply to research focused staff at UNSW.

Given the provisions of schedule 3 of the Agreement, UNSW is able to negotiate a predominantly teaching position with employee at any point in an academic career, including before employment commences.

....

... Academic workload arrangements recognise and provide for academic staff performing a predominantly teaching role for a defined period. Given predominantly teaching only roles are required to operate on a proportional basis, any such staff would be protected by the quantifiable maximum articulated in the workload model. At the time of UNSW's offer, prospective employees are advised of the application of the Agreement and will no doubt take steps to satisfy themselves of the effect of these provisions on the role they apply for. There is no proper basis you to assert the prospective employees' acceptance of offers would be anything other than genuine and without duress."

- d) On 1 June 2016 the NTEU again wrote to UNSW about the teaching focused positions that were advertised and notified them of a dispute under the Agreement.
- e) On 9 June 2016 a first dispute meeting was held between the parties. The dispute was not resolved. Further correspondence passed between the parties and a second meeting was held, but the dispute remained unresolved.
- f) On 13 October 2016 UNSW filed the present application for the Commission to deal with a dispute in accordance with the dispute settlement procedure in the Agreement.
- g) On 25 October 2016 the Commission conducted a conciliation conference. The dispute remained unresolved and was programmed for an arbitration hearing.

Issue in dispute

- [10] One question was agreed between the parties to be determined as follows:

Does the UNSW Australia (Academic Staff) Enterprise Agreement 2005 permit UNSW to:

- a) *advertise roles for teaching focussed academics,*
- b) *engage teaching focussed academics for a defined period, or*

- c) *allocate teaching focussed duties to academic staff (with their agreement) for a defined period (having advertised for such roles)?¹*

Particulars

[11] On 7 November 2016 UNSW filed the following Particulars of Application:

“5. UNSW’s enabling act empowers the Council ‘for and on behalf of the University in the exercise of the University’s functions...’ to ‘appoint and terminate the appointment of academic and other staff of the University’: University of New South Wales Act 1989 (NSW) section 15(1)(b).

The Council may also constitute faculties, ‘consisting of the professors, associate professors, principal lecturers, senior lecturers, lecturers and associate lecturers (or such alternative designations as may be adopted...) and such other persons having appropriate qualifications as the Council may appoint to the faculty’: University of New South Wales By-law 2005 (NSW), clause 60.

6. Council’s powers to appoint academic staff are delegated to other officers of UNSW in accordance with its register of delegations. The Agreement itself does not empower UNSW to, nor does it restrict UNSW from, employing academic staff.

7. Clause 5.1 of the Agreement provides that the Agreement covers UNSW and employees employed by UNSW, except employees excluded by operation of clause 5.2. The Agreement applies to academic staff appointed to Levels A-E, subject to specific exclusions in clause 5.2 (which are not relevant to this application).

8. The Agreement has application only upon commencement of employment. This is consistent with sections 52 and 53 of the *Fair Work Act 2009* which set out when an enterprise agreement covers and applies to an employer and an employee – there needs to be an existing employment relationship. The rights and responsibilities of the parties under the Agreement apply from the point at which employment commences.

9. Clause 15.0(a) of the Agreement provides that UNSW ‘will appoint staff on terms which correspond with one or other of the types of appointment prescribed in clauses 16.0 – 19.0’. Clause 16.0 and 17.0 are relevant and are dealt with at paragraphs 13 to 15 below.

10. Clause 15.0(c) of the Agreement provides that ‘Nothing in clauses 16.0 – 19.0 shall limit the number of or proportion of staff that the University may employ in a particular type of appointment’.

11. Clause 15.0(f) provides that ‘the parties recognise the importance of providing opportunities for continuing and fixed-term employment wherever possible in order to improve the level of job security within the University’. Meeting UNSW’s increased teaching needs with fixed term or continuing employees instead of casual employees is consistent with this clause of the Agreement.

12. Clause 15.0(g) of the Agreement provides that:

During the term of this Agreement, the University will seek to increase the number of continuing and fixed-term positions across the University to carry out the work that would otherwise be undertaken by casual employees. A variety of merit based recruitment initiatives may be used including positions specifically for early career academics and positions specifically for postgraduate students.

Casual employees employed under the Agreement are employed to undertake teaching or teaching related work only (i.e. not research work) including lectures, tutorials, demonstrations

¹ PN10 – PN17.

and marking. Again, a proposal by UNSW to meet its increased teaching needs with fixed term or continuing employees instead of casual employees is consistent with this clause of the Agreement.

13. One type of appointment provided for under the Agreement is continuing employment, defined in clause 16.0(a).

14. Another type of appointment provided for is fixed term employment, defined in clause 17.0(a) of the Agreement. Clause 17.0(c) and (d) set out a number of circumstances in which the University may offer fixed term contracts. Clause 17.0(c) provides that 'fixed term appointments shall generally be limited to work activity that comes within the description of one or more of the following circumstances' [listed in the subcategories in clause 17.0(c)]. UNSW considers that the following circumstances (by way of example and not exhaustive) could be relevant to teaching focused roles depending on the factual circumstances:

(a) to work on a specific task or project where a definable work activity has a starting time and which is expected to be completed within an anticipated timeframe: clause 17.0(c)(i);

(b) to work in a position funded from the Strategic Priorities Fund of the University or to work in a new organisational area, function or program where the prospective need or demand for which is uncertain or unascertainable at the time of establishment of the new area, function or program, in which case fixed-term employment may be offered for a total of up to three years: 17.0(c)(iv);

(c) to work in an academic unit where there is a sudden unanticipated increase in enrolments in which case fixed-term employment may be used for a total of up to three years: 17.0(c)(v);

(d) to work in an area that is performing one or more functions or teaching one or more programs which will cease within a reasonably certain time. Where part or all of an organisational unit is to be disestablished, staff may be employed on a fixed-term contract for a total of up to two years: 17.0(c)(vi), or

(e) to undertake work where a curriculum in professional or vocational education requires that the work be undertaken by a staff member who has recent practical or commercial experience, in which case a staff member may be employed on up to three successive fixed-term contracts within a total period of employment of up to three years: 17.0(c)(x).

15. Clause 17.0(d) of the Agreement also provides for convertible tenure track contracts whereby 'the position is offered for a period of between 3 and 5 years on the basis that the University will, at the expiration of the contract, convert the employment from fixed-term to continuing employment' unless performance expectations have not been met or there is insufficient productive work. UNSW considers that convertible tenure track contracts could be relevant to teaching focused roles depending on the factual circumstances.

16. Item (a) of Schedule 3 of the Agreement provides that:

The UNSW Position Classification Standards (PCSs) in this [sic] Schedule [Schedule 4] of the Agreement describe the broad categories of responsibilities associated with continuing and fixed-term employment at different levels. The standards are not exhaustive of all tasks in academic employment, which is by its nature multi-skilled and involves an overlap of duties between levels. [underlining added]

17. Schedule 4 sets out the general standard, specific duties and skill base of each of the Levels A – E. For each Level, the specific duties required are not expressed as mandatory and exhaustive, and are prefaced with 'may include'. For example:

LEVEL C (SENIOR LECTURER) General Standard

A Level C academic is expected to make significant contributions to the teaching effort of a department, school, faculty or other organisational unit or an interdisciplinary area. An academic at this level is also expected to play a major role in scholarship, research and/or professional activities.

Specific Duties

Specific duties required of a Level C academic may include:

- The conduct of tutorials, practical classes, demonstrations, workshops, student field excursions, clinical sessions and studio sessions.
- Initiation and development of course material.
- Course coordination.
- The preparation and delivery of lectures and seminars.
- Supervision of major honours or postgraduate research projects.
- Supervision of the program of study of honours students and of postgraduate students engaged in course work.
- The conduct of research.
- Significant role in research projects including, where appropriate, leadership of a research team.
- Involvement in professional activity.
- Consultation with students.
- Broad administrative functions.
- Marking and assessment.
- Attendance at departmental and/or faculty meetings and a major role in planning or committee work.

Skill Base

A Level C academic will normally have advanced qualifications and/or recognised significant experience in the relevant discipline area. A position at this level will normally require a doctoral qualification or equivalent accreditation and standing. In determining experience relative to qualifications, regard will be had to teaching experience, experience in research, experience outside tertiary education, creative achievement, professional contributions and/or to technical achievement. In addition a position at this level will normally require a record of demonstrable scholarly and professional achievement in the relevant discipline area. [underlining added]

18. Each of the classifications is sufficiently flexible to permit UNSW to appoint academics to roles which are research focused or teaching focused, on either a continuing basis (for a defined period) or a fixed term basis, in accordance with the applicable provisions of clauses 16.0 or 17.0 of the Agreement. Consistent with this, UNSW extensively employs research-focused academics, on both fixed term and continuing bases.

19. UNSW is permitted to enter into agreements with teaching and research academics to do a teaching focused role for a defined period, including from commencement. Item (c) of Schedule 3 provides amongst other things:

It is recognised that at a given point in an academic career, an employee may agree with their supervisor to perform a predominantly teaching or research role for a defined period due to the performance strengths or preferences of the employee. In entering into any such agreement with an early career academic, the University will take into account the need for that employee to establish a research profile.

20. Employee's agreement. Item (c) of Schedule 3 permits UNSW to negotiate specific teaching arrangements with a successful candidate during the recruitment process, and to reach agreement with the candidate about those arrangements either during the recruitment process (to take effect on commencement) or with the successful candidate/staff member at any time on or after their first day of employment. The type of employment, within which an agreement about teaching arrangements is reached, can be either continuing or, if the provisions of clause 17.0 of the Agreement are met, fixed term employment.

21. While the Agreement does not require it, as a matter of good human resources practice and so as not to misrepresent the nature of the role, the job advertisement should note that UNSW wishes to

negotiate and agree on specific teaching arrangements with successful candidates (and three of four the advertisements the subject of the dispute did contain wording to that effect).

22. Before deciding whether to apply for or to accept such a role, candidates can inform themselves of the parties' rights and responsibilities under the enterprise agreement, including having regard to Schedule 3 and clauses 15.0-17.0 and 24.0 of the enterprise agreement. Like any offer of employment, a candidate may accept or decline UNSW's offer on those terms. The candidate is considering an offer of employment where an existing enterprise agreement is in force, as well as policies and practices negotiated and agreed in accordance with the enterprise agreement and will therefore receive the benefit of terms negotiated by others.

23. Performance strengths or preferences of the employee. UNSW will take into account a staff member's strength and preference as evidenced by their interest in the position and their addressing of the selection criteria, either during the recruitment process (to take effect on commencement) and/or at any time on or after the staff member's first day of employment.

24. Early career academic. If the candidate is an *'early career academic'*, UNSW will take into account the need (if there is one) for the employee to establish a research profile as part of the discussion with the candidate either during the recruitment process (to take effect on commencement) and/or with the successful candidate/staff member at any time on or after their first day of employment.

25. Workload allocation. The candidate, once employed, will receive the benefit of the workload model developed through the collegial, equitable and transparent process described in clause 24.2(a) of the Agreement. These include express provisions requiring:

(a) A quantifiable maximum on teaching contact hours, consistent with clause 24.2(d) and (e); and

(b) Adjustments for higher or lower workloads in the following year or other alternative period – clause 24.2(h).

26. The workload clause in the agreement contains specific provisions in relation to teaching focused academics (employees who have agreed to perform a predominantly teaching role for a defined period) being that:

(a) where 'an agreement has been made in accordance with clause (c) of Schedule 3 for an employee to perform a predominantly teaching role for a defined period, the maximum teaching contact hours... may be exceeded on a proportional basis': clause 24.2(f); and

(b) an employee who has reached an agreement under 24.2 (f) can be 'required to teach in more than two teaching sessions per year in any 12- month period. Where an employee agrees to teach in more than two sessions, compensation through workload allocation or salary will be provided to the employee': clause 24.3(f).

27. The specific teaching arrangements discussed – either with the candidate during the recruitment process (to take effect on commencement) and/or with the successful candidate/staff member at any time on or after their first day of employment – will include information about the applicable workload allocation model, consistent with the requirements of clause 24 of the enterprise agreement.”

[12] On 6 December 2016 the NTEU responded to the Particulars of Claim as follows:

“50. In paragraph 3 of the Applicants submissions, the Applicant ‘...relies on clauses 5, 15, 16, 17, 24, and Schedules 3 and 4 of the Agreement’. Yet in citing these clauses, the Applicant does not apply ‘the form and content of the agreement (Golden Cockerel). The Respondent has outlined the plain meaning of these clauses in the first section of our submissions above. The Respondent further notes that the Applicant does not consider Clause 5.2 relevant to their Application, when the relevance of this Clause

is that it provides the primary exclusions of the Agreement, which follows that unless otherwise specifically excluded, the application of all terms of the Agreement, and specifically Schedule 3, apply to all employees.

51. The Applicant attempts to assert in paragraph 6 of their particulars that ‘the Agreement does not empower the University to, nor does it restrict the University from, employing Academic staff’, and instead suggests that external legislation such as the University of New South Wales Act (1989) NSW and the University of NSW By-law 2005 (NSW) instead regulate the types of appointments the Applicant can make, a strange argument to make in an F10 application made by the Applicant to seek a determination of the Agreement. It is also incorrect, as the Agreement explicitly provides at Clause 15.1 (a) that: ‘The University will employ staff on terms that correspond with one or other of the types of appointment prescribed in clauses 16.0 – 19.0.’

52. The Agreement applies to all Academic employees as outlined in the Clause 5.0 Application, and the Applicant is attempting to assert a new type of employee can exist outside the terms of the Agreement, as the ‘Agreement does not restrict the University.’ Yet the Full Bench of the IRC NSW has already determined that an employer cannot attempt to have employees fall outside of the Agreement simply because they have altered their duties (Firefighters’ Award [2002] NSWIRComm 159 [55]); and a Full Bench of the Australian Industrial Relations Commission concluded that changing the name of a position held by an employee could not remove the employee from the coverage of the industrial instrument (CSR Limited Officers’ Association v CSR Limited (1997) 76 IR 310, 313). The Applicant relies upon two incorrect interpretation arguments, firstly here that they can create a new form of employment outside of the scope of the instrument; and secondly that the Applicant is entitled to seek to appoint employees inconsistent with the terms of the Agreement, because there is no express prohibition on the Applicant creating a new class of employee in order to subvert the terms of the EA. These two cases show that this approach to interpretation is incorrect, and that employers have attempted this very action before, and correctly been prohibited from doing so.

53. As established in *Re Cram and Others: Ex parte NSW Colliery Proprietors’ Association Limited and Others* HCA 163 CLR 117 (‘Cram’), the Respondent has a direct interest in the recruitment of employees consistent with the terms of the agreed employment conditions, for as noted in that significant decision: ‘...the impact of the employer-employee relationship of the...mode of recruitment is direct and not merely consequential’. *Cram* at 89.

54. The Respondent would be equally concerned at an attempt by the Applicant to advertise a Level A or B academic position, and in the advertisement assert they would deny the entitlement of parental leave upon commencement of employment, or refuse to pay the correct pay rate upon commencement of employment. No more can the Applicant propose to advertise a type of employment inconsistent with the terms of the Agreement; let alone propose a type of employment which would deny the entitlements to academic staff contained in Schedule 3 (c).

55. Again, in the Applicants particulars, the Applicant conflates a type of employment appointment permitted in Clauses 15.0-19.0 with, ‘a role for a defined period of time’, attempting to deny the entitlements of all employees employed to teach and research at UNSW.

56. The Applicant is correct at paragraph 11 of their particulars, there is nothing inconsistent with the terms of the EA in increasing the number of permanent and fixed term employment, yet it is important to note the goal of increasing secure employment should again not be conflated with the Applicants goal of creating a new type of employment with less entitlements than other employees in that class of academic employment.

57. The Applicants arguments in paragraph 12 of their particulars fundamentally misunderstand the engagement of casual staff consistent with the terms of the Agreement. The pay rates for elements of casual work are outlined in Schedule 2. The notion that because casual staff are usually only engaged to perform teaching and teaching related work, that this should mean an employee who gains either ongoing or fixed term work should be employed in terms inconsistent with the terms of the Agreement, is nonsensical. As can be seen in the additional wording to Schedule 3 (c) when the parties agreed to these words in the 2011 Enterprise Agreement (see Tab 3 of the Applicants submissions, 2011

Agreement), an early career academic should be given additional consideration when choosing whether to agree to a teaching focused role for a defined period of time, in order to be given the opportunity to establish a research profile, crucial to their career path as an Academic.

58. A post graduate student, on the other hand, who may gain casual or fixed term work while studying, and who may or may not choose an Academic career in which the establishment of a research profile is vital, is not given the benefit of this consideration, if employed in the category of Post Graduate Fellowship employees, who are specifically excluded to the benefit of Schedule 3 (c).

59. The particulars convey in paragraph 15 that the Applicant is ‘ventilating alternative meanings’ of plain and ordinary language provisions (*Norwest Beef Industries v Australian Meat Industry Employees Union* (1984) 12 IR 314, 331 (Olney J) (*Norwest Beef Industries*)). The Applicant demonstrates the scope of their claims by suggesting that:

‘UNSW considers that convertible tenure track contracts could be relevant to teaching focused roles depending on the factual circumstances.’

60. Yet convertible tenure track fixed term employees, as provided for in Clause 17.(d) as a form of fixed term employment, are entitled to the benefit of Schedule 3 (c), as are all academics employed to both teach and research. The Applicant is entitled to have claims, which they are entitled to bring to the bargaining table.

61. The clear language of the text of the Agreement should apply, but here the Applicant is ‘...astute to discern ambiguity’ for the benefit of the Applicant, where no such ambiguity exists.

62. As the Applicant consistently conflates job type and role, they obscure the benefit for the employee in being advised of the type of employment they have been appointed to, which is another clear entitlement which would be denied by the advertisements the Applicant has submitted (at Ward Exhibit 1, Tab A). The Applicant is obligated to engage an employee as ongoing, or if fixed term employee, advise of the nature of the fixed term work, as per Clause 17.0 (a): ‘A fixed-term appointment is made for a specified term or ascertainable period...An employee will be advised in writing of the category of fixed term employment set out in sub-clauses 17.0 (c) and (d) below.’ The Applicant has not advised of the category of appointment which will apply, consistent with the terms of the Agreement, in the Applicants advertisements for the prohibited appointment for ‘teaching focused’ appointments.

63. The Applicant makes reference to the broad functions, skills and tasks outlined by the classification standards, yet in paragraph 18 confuse the application and purpose of the standards. The classification levels value the work, in order that the pay of a particular classification level corresponds to a particular value – a value which corresponds to a pay rate – within the Agreement. The classification levels demonstrate the value of skills and tasks, they do not proscribe what skills and tasks a particular type of employee will perform on appointment, these provisions are outlined clearly in Clauses 15.0-19.0.

64. In respect of the Applicants submissions at paragraphs 19 and 20; the Respondent does not dispute that the employer can propose a teaching focused role for a defined period on to an academic employed to do teaching and research, on or after their first day of employment, but the Respondent does not agree that the Applicant can advertise a job inconsistent with the terms of the agreement, such as the Applicants claim of ‘teaching focused’ appointments. From the commencement of employment, and employee employed to do both teaching and research has the benefit of Schedule 3 (c). The employee has the right to consider their own needs and say no, from the commencement of their employment.

65. In the same way that the Applicant is not entitled to advertise a job at a particular classification level and propose to pay the employee less pay that the figure provided for in the Agreement for that classification level, the Applicant is prohibited from advertising an appointment which is not consistent with the terms of the Agreement; and which negates the right of the employee to consider, in an informed manner, by reference to the workload clause, the stage of their own career and need to establish a research profile, and to finally choose to agree or not agree to a teaching focused role for a defined period of time.

66. In respect of the Applicants arguments at paragraph 21 of their particulars, the Respondent agrees that the Applicant could advise candidates of the opportunity to enter into a teaching focused position upon commencement of employment, as this is entirely consistent with the terms of the Agreement, and we have proposed such wording to the Applicant (see Respondent Exhibit 1). The clear intention of the Applicant to incorrectly apply the clauses of the Agreement is demonstrated in paragraph 21 of the Applicants particulars, when the Applicants' advertisements state: 'the employer wants to negotiate and agree' on a teaching focused appointment. The Applicant uses the term education focused, but there is no such term in the agreement, and the employer is presumably proposing a 'teaching focused' appointment. On appointment, the employee has the right to consider this, and the employer has the right to not agree. Akin to not having to agree to a lower salary point to perform the same work at a particular classification level, the academic employed to do teaching and research does not have to agree to a different workload role for a defined period of time, they are entitled to say no. The proposed determination, and the advertisements attached to the Applicant's submissions at Ward Exhibit 1, A of the Applicants submissions, are inconsistent with the terms of the enterprise agreement, and must be denied.

67. The Applicants submissions at paragraph 22 are offensive and inconsistent with the terms of the Agreement. Imagine if the Applicant was entitled to deny the benefit of the parental leave terms to an external candidate who was willing to accept that denial? Or alternatively accept that would agree to forego redundancy pay consistent with the terms of the Agreement. An external candidate does not hold the right to inconsistently apply the terms of the agreement, no more than the Applicant does. There is no provision of the Agreement, unlike the WorkChoices era, which allows the employer to negotiate employment on lesser terms than that which the Agreement provides.

68. The dispute is resolved by application of the Agreement consistent with the terms of the Agreement. An academic employed to do both teaching and research has the benefit of the entitlement of all provisions of the Agreement, including Schedule 3 (c), on commencement of employment, being the first day of their employment, an agreed start date of employment designated in their offer of employment."

What does the Agreement provide?

[13] The relevant parts of the Agreement that give rise to the dispute are as follows:

"Clause 5 – Application

5.1 Coverage of Agreement

This Agreement covers:

- (i) the University; and
- (ii) employees employed by the University, except for those employees or persons referred to at subclause 5.2(a) below.

5.2 Exclusions from Agreement

(a) This Agreement does not cover:

- (i) an employee who is party to either an Australian Workplace Agreement (AWA) or an Individual Transitional Employment Agreement (ITEA) with the University, subject to subclause 5.2(b) below;
- (ii) professional staff (formerly referred to as general staff) employed by the University;
- (iii) persons employed as fellows at the University's Colleges; and
- (iv) persons employed by separate legal entities controlled by UNSW (provided that this will not affect the application of the Agreement as a result of any transfer of business).

(b) An employee who is party to either an Australian Workplace Agreement (AWA) or an Individual Transitional Employment Agreement (ITEA) with the University that applies to the employee may enter into a conditional termination in writing or otherwise take steps to terminate their AWA or ITEA so that the terms and conditions of this Agreement will apply to that employee's employment, subject to applicable legislation.

...

Clause 15 – Categories of employment

- (a) The University will employ staff on terms that correspond with one or other of the types of appointment prescribed in clauses 16.0 – 19.0.
- (b) Nothing in clauses 16.0 – 19.0 prevents a staff member engaging in additional work on a casual appointment in work unrelated to, or identifiably separate from, the staff member's normal duties.
- (c) Nothing in clauses 16.0 – 19.0 shall limit the number or proportion of staff that the University may employ in a particular type of appointment.
- (d) A staff member employed on a continuing or fixed-term basis may be employed as a full-time or fractional-time employee.
- (e) The University recognises that employees have caring responsibilities outside of work, and the University will genuinely consider any application by an employee to move from full-time to fractional employment to accommodate the employee's caring responsibilities.
- (f) The parties to this Agreement recognise the importance of providing opportunities for continuing and fixed-term employment wherever possible in order to improve the level of job security within the University.
- (g) During the term of this Agreement, the University will seek to increase the number of continuing and fixed-term positions across the University to carry out the work that would otherwise be undertaken by casual employees. A variety of merit based recruitment initiatives may be used including positions specifically for early career academics and positions specifically for postgraduate students.
- (h) The University's aim is to make 30 such appointments over the life of this Agreement. The parties agree to meet at the midpoint of this Agreement upon request to determine if the University is on track to make this number of appointments and, if not, to discuss steps that could be taken to help achieve this aim.

Clause 16 - Continuing employment

- (a) Continuing employment means full-time or fractional-time employment that does not have a fixed end date or a contingency upon which the employment contract will come to an end.
- (b) All employment other than fixed-term employment and casual employment will be continuing employment.
- (c) Notwithstanding subclause 16.0(b) above, the University may employ a person in Continuing (Contingent Funded Research) employment on a full-time or fractional-time basis in accordance with the terms of this Agreement.

Clause 17 – Fixed Term Employment

- (a) A fixed-term appointment is made for a specified term or ascertainable period. The contract for this employment will specify the starting and finishing dates of that employment, (or in lieu of a finishing date, will specify the circumstance(s) or contingency relating to a specific task or project, the occurrence of which means the term of the employment will expire). An employee will be advised in writing of the category of fixed-term employment set out in subclauses 17.0(c) and (d) below. During the term of employment, the contract is not terminable by the University, other than during a probationary period, or for cause based on unsatisfactory performance, serious misconduct or due to ill health or redundancy, and in accordance with the relevant clauses in this Agreement where applicable.
- (b)

Clause 18 – Continuing (Contingent Funded Research) Employment

The provisions of this clause will commence operation from the date three months after commencement of this Agreement.

18.1 Definitions

“Contingent funded research” is research funded by limited term funding provided from external sources, but not funded through an operating grant from Government or funding comprised of payment of fees made by or on behalf of students.

18.2 Eligibility

- (a) An employee engaged in contingent funded research may apply for, or be offered, a Continuing (Contingent Funded Research) Employment contract (CCFRC) to perform predominantly or exclusively research work where the employee:
 - (i) is 0.2 FTE or more;
 - (ii) has been employed in fixed-term academic employment at the University for a period of 3 years or more, and who is to be appointed to their second or subsequent consecutive contract; and
 - (iii) is “research active” as defined by the University’s Deputy Vice-Chancellor (Research).
- (b) The University may, in its absolute discretion, offer a CCFRC notwithstanding not all of the above criteria are satisfied.
- (c) Applications must be made in writing to the University and the University will advise the employee in writing of the outcome within 30 days of receiving the application. The University may only refuse an application on reasonable grounds. Reasonable grounds include:
 - (i) the criteria in subclause 18.2 are not satisfied;
 - (ii) that there is a reasonable basis to believe that there will not be sufficient revenue or funding available to provide continuing support for the employee’s employment beyond a further 3 year period;
 - (iii) the employee’s performance has been assessed and found not to be at least satisfactory;
 - (iv) the employee has not been appointed or considered appointable, through a competitive selection process for the position or for an equivalent position; or
 - (v) the employee does not have sufficiently transferable skills that would reasonably enable the University to redeploy the employee to another position within the University upon expiration of the existing research grant; or
 - (vi) the employee is a student, and their status as a student was the primary reason for their appointment.

....

Clause 19 – Casual Employment

19.1 Casual Employees - Duties

- (a) In recognition of occupational health and safety responsibilities, the regular workload of a casual employee should not entail their working more than 37.5 hours per week (including associated working time, as prescribed in Schedule 2 of this Agreement).
- (b) A casual employee can be required to perform duties of the type described in Schedule 2 of this Agreement.
- (c) A casual employee should not be responsible for the employment or supervision of other staff or for the development of on line teaching and learning.
- (d) A casual employee is not expected to engage in research duties. For the purpose of this subclause, preparation for teaching and course/subject development is not regarded as research.
- (e) A casual employee who performs full or the majority of subject coordination work will be paid at the appropriate casual lecturer rate in Schedule 2 (1a to 1d) for each hour of teaching.
- (f) A casual employee should only be involved in administration to the extent that it is necessary to support their teaching related function.
- (g) All marking will be paid for in accordance with the applicable rates set out in Schedule 2 of this Agreement, except for marking undertaken during a teaching contact hour.

19.2 Casual Employees - Offer of Employment

- A person who is offered casual academic employment for a continuous period of more than four (4) weeks will be given a written offer of employment which will include:
- (i) a statement of duties to be performed, the relevant pay rates for each duty and the anticipated number of hours required;
 - (ii) a statement that additional duties will be paid for;
 - (iii) entitlements with respect to superannuation;
 - (iv) sources that can be contacted for further information about their employment; and
 - (v) notification of the requirement to disclose other academic employment at the University.

....

Clause 24 – Academic Workloads

This clause does not apply to a casual employee. See Clause 19.1 for information on casual academic workloads, and Schedule 2 for information on the duties and responsibilities of casual academic staff.

24.1 Principles

The following principles shall govern the application of this clause:

- (a) a reasonable level and equitable distribution of workload for academic staff recognising the diversity of the University and the range of activities undertaken by academic staff in the course of a year; and
- (b) a transparent process of work allocation that is generally supported by the employees of the Academic Unit; and
- (c) consultation about workload allocation.

24.2 Workload Formula

(a) A workload formula will be in place in each Academic Unit (or commonly across more than one Academic Unit). The workload formula:

- (i) will be developed through a collegial process; and
- (ii) should be generally supported by the employees in the Academic Unit(s); and
- (iii) will provide for the equitable and transparent allocation of workload within the Academic Unit.

(b) To support a transparent allocation of workload, a workload formula should enable an employee to compare their workload with every other individual employee across the Academic Unit.

(c) The workload formula will be developed in a way that identifies a transparent correlation between the measure applied and the hours of work generated. The workload formula will cover, where relevant:

- the level of courses taught;
- modes of delivery of teaching and learning activities;
- the scale of teaching responsibilities including the number of students and classes and associated activities such as course co-ordination, preparation, marking and consultation;
- supervision of staff and students;
- research, scholarship and creative production;
- curriculum development and revision, other than normal preparation for teaching;
- staff development activities;
- field work supervision;
- internal and external professional work;
- administration;
- any reasonable accommodation for disability;
- overseas teaching;
- special studies program or internal release.

(d) The workload formula must contain a quantifiable maximum on required workload measured in hours and subject to the provisions of 24.2 (f) a quantifiable maximum on teaching contact hours. Despite this, the requirements of this sub-clause shall be taken to have been met in circumstances where some types of work (other than teaching and related tasks) are excluded in respect of all staff or all staff in particular categories, but with an appropriate reduction in the total workload accounted for in the model.

- (e) The allocation of teaching contact hours to an employee will be consistent with the workloads formula. The teaching contact hours of a fractional employee will be based on an equivalent fraction of teaching contact expectations of a full-time employee within the Academic Unit. It is recognised that allocated teaching duties to an employee may ebb and flow over the course of a year.
- (f) Where an agreement has been made in accordance with clause (c) of Schedule 3 for an employee to perform a predominantly teaching role for a defined period, the maximum teaching contact hours referred to in 24.2(c) above may be exceeded on a proportional basis.
- (g) Work allocated to an employee will be reduced to reflect any significant periods of planned leave, or significant unplanned leave (eg sick leave) in excess of the standard four weeks annual leave per annum. Work allocated to an employee will be increased to reflect circumstances where the employee takes significantly less than the standard four weeks annual leave per annum.
- (h) Where a significantly higher or lower workload is allocated to an employee in one year (or an alternative period specified in the workloads formula) disregarding any adjustments referred to in subclause 24.2(g) above, an equivalent adjustment to the employee's workload allocation will be made in the following year (or alternative period as agreed by the employee).

24.3 Periods of Scheduled Teaching

- (a) An employee will not be required to undertake scheduled teaching on public holidays, or before 8:00 am or after 9.30pm without their agreement.
- (b) An employee will not normally be required to undertake scheduled teaching on weekends.
- (c) When teaching on weekends is proposed, the supervisor will consult with the employee and seek to address any issues of concern raised by the employee about teaching during such times, including the employee's family responsibilities. This will not be taken as a limitation on the circumstances in which a supervisor should consult employees about the impact of teaching hours on employees with family responsibilities.
- (d) Scheduled teaching on weekends, public holidays and/or before 8:00am or after 9.30pm will be specifically recognised in the workloads weighting formula of the Academic Unit.
- (e) The current University practice of conducting teaching sessions outside the traditional teaching periods that are arranged directly between the employee's supervisor with the agreement of the employee will continue.
- (f) No employee except an employee who has reached an agreement under 24.2 (f) will be required to teach in more than two teaching sessions per year in any 12-month period. Where an employee agrees to teach in more than two sessions, compensation through workload allocation or salary will be provided to the employee.
- (g) It is recognised that there are some Academic Units that currently organise teaching sessions in a manner different to that which has traditionally been applied in most of the University, in respect of the number or duration of such sessions. In these cases, the limitation to two teaching sessions will not apply and in lieu of this the limitation shall be designated in the workloads formula so as to support an appropriate balance of teaching and research.
- (h) Overseas teaching will only be allocated to an employee with their agreement.

24.4 Review of an Employee's Workload

An employee may seek to have their workload reviewed by raising the matter first through normal University channels and, if unresolved, the matter can be further reviewed by a committee comprising:

- (i) another academic employee of the University nominated by the employee, or by the

employee's designated representative;

- (ii) the Deputy Vice-Chancellor; and
- (iii) the President of the Academic Board.

Schedule 3 – Duties and Responsibilities of Academic Staff at UNSW

(a) The UNSW Position Classification Standards (PCSs) in this Schedule of the Agreement describe the broad categories of responsibilities associated with continuing and fixed-term employment at different levels. The standards are not exhaustive of all tasks in academic employment, which is by its nature multi-skilled and involves an overlap of duties between levels.

(b) The appointment or promotion of an employee to a particular level does not prohibit the University from requiring that employee to undertake duties associated with a lower level provided those duties are commensurate with, and appropriate to, the skills and qualification of the employee.

(c) Academics employed to do both teaching and research can expect to make a contribution to a diversity of functions within the University. Such functions include teaching, research, participation in professional activities and participation in the academic planning and the governance of the University. The balance of the functions will vary according to level and position over time. All teaching and research academic staff will be provided with the opportunity to undertake the full range of academic duties commensurate with the classification level to which they have been appointed. It is recognised that at a given point in an academic career, an employee may agree with their supervisor to perform a predominantly teaching or research role for a defined period due to the performance strengths or preferences of the employee. In entering into any such agreement with an early career academic, the University will take into account the need for that employee to establish a research profile.

(d) A research only employee will be appointed at a level at least consistent with the "Guidelines for Appointment of Academic Research Staff" which were in place on the day before the commencement of the Agreement.

(e) Where a dispute arises as to the appropriate duties of an employee, it will be dealt with in accordance with clause 10.0 – Dispute Resolution Procedures - of this Agreement. Should it prove to be the case that the employee has been performing duties at a higher classification, the remedies will be specifically limited to:

(i) payment of an allowance calculated to adjust the salary of the employee to at least the minimum point on the next highest scale, but no more than the salary of the person whose duties are taken over; or

(ii) removing the higher level duties from the employee.

Provided that the University may decide that reclassification of the employee to a higher level is an appropriate remedy.

(f) When an Associate Lecturer is required to take over the duties of a Lecturer for a period longer than five (5) continuous working days, a higher duties allowance will be paid to adjust the salary to at least the minimum point on the Lecturer's scale, but no more than the salary of the person whose duties are taken over."

Principles of construction of agreements

[14] In October 2014 a Full Bench of the Commission heard an appeal in *The Australian*

Meat Industry Employees Union v Golden Cockerel Pty Limited (Golden Cockerel).² In summary, the appeal concerned the principles relevant to the interpretation of an agreement. The Full Bench went to great lengths to set out the relevant principles and relevant authorities. The principles can be summarised as follows:

“[41] From the foregoing, the following principles may be distilled:

- 1. The AI Act does not apply to the construction of an enterprise agreement made under the Act.*
- 2. In construing an enterprise agreement it is first necessary to determine whether an agreement has a plain meaning or contains an ambiguity.*
- 3. Regard may be had to evidence of surrounding circumstances to assist in determining whether an ambiguity exists.*
- 4. If the agreement has a plain meaning, evidence of the surrounding circumstances will not be admitted to contradict the plain language of the agreement.*
- 5. If the language of the agreement is ambiguous or susceptible to more than one meaning then evidence of the surrounding circumstance will be admissible to aide the interpretation of the agreement.*
- 6. Admissible evidence of the surrounding circumstances is evidence of the objective framework of fact and will include:*
 - (a) evidence of prior negotiations to the extent that the negotiations tend to establish objective background facts known to all parties and the subject matter of the agreement;*
 - (b) notorious facts of which knowledge is to be presumed;*
 - (c) evidence of matters in common contemplation and constituting a common assumption.*
- 7. The resolution of a disputed construction of an agreement will turn on the language of the Agreement understood having regard to its context and purpose.*
- 8. Context might appear from:*
 - (a) the text of the agreement viewed as a whole;*
 - (b) the disputed provision’s place and arrangement in the agreement;*
 - (c) the legislative context under which the agreement was made and in which it operates.*
- 9. Where the common intention of the parties is sought to be identified, regard is not to be had to the subjective intentions or expectations of the parties. A common*

² [2014] FWCFB 7447.

intention is identified objectively, that is by reference to that which a reasonable person would understand by the language the parties have used to express their agreement.

10. *The task of interpreting an agreement does not involve rewriting the agreement to achieve what might be regarded as a fair or just outcome. The task is always one of interpreting the agreement produced by parties.”*

[15] Each of the parties relied upon the Golden Cockerel principles.³

[16] In coming to this decision the Commission, as presently constituted, has had regard to the authorities referred to by the Full Bench and has adopted the relevant principles.

Evidence

[17] The only evidence came from David Ward, the Vice-President Human Resources at the University of New South Wales. Mr Ward’s evidence went to,

- a) his employment and knowledge of the University,
- b) the history of enterprise agreements at the University back to 2000, and
- c) the correspondence regarding the present dispute.

[18] All those aspects of Mr Ward’s evidence, which had been filed and related to bargaining in 2014 and 2015 (and to which the NTEU took objection), were not relied upon by UNSW.⁴ The documents behind tabs J to S and referred to in Mr Ward’s witness statement were also not relied upon.⁵ On that basis the NTEU did not require Mr Ward for cross-examination.⁶

Submissions

Applicant

[19] On 22 November 2016 UNSW submitted that:

“8. There is nothing in the text of the Agreement which expressly prohibits the engagement of academic staff in teaching focussed roles.

9. First, had a starting point, it is fundamental to know that the Agreement should be construed in light of the objective surrounding circumstances including the University of New South Wales Act 1989 (NSW) (UNSW Act) and the University of New cap south Wales Bylaw 2005 (NSW) (Bylaw). Relevantly, these provide the UNSW with broad powers as to the engagement of academic staff, as follows:

- (a) Section 15 (1) (B) of the UNSW Act empowers the Council “4 and on behalf of the University in the exercise of the University’s function...” To “appointed terminate the

³ See UNSW Exhibit “A2”, para 7 and NTEU Exhibit “R1”, para 32.

⁴ PN28 – PN37.

⁵ PN40.

⁶ PN46.

appointment of academic and other staff of the University”.

(b) clause 60 of the bylaw provides that the Council may also constitute faculties, “consisting of the professors, associate professors, and for lecturers, senior lecturers, lecturers and associate lecturers (or such alternative designations as may be adopted...) And such other persons having appropriate qualifications as a Counsel may point to the faculty.”

10. There is nothing within the UNSW Act or the bylaw which prohibits the UNSW engaging academic staff to “teaching focused roles”.

11. Second, although clause 5.1 of the Agreement makes it plain that the Agreement applies to academic staff appointed 2 levels A-E (subject to specific exclusions in clause 5.2 (which are not relevant to this application), there is nothing within the text of the Agreement which prohibits UNSW of engaging staff in a “teaching focused role”.

12. Third, although the agreement prescribes a different manner by which academic staff may be engaged (i.e. full-time, part-time, et cetera) it does not prohibit engagement of teaching focused academic staff. For example:

(a) Clause 15.0(a) of the Agreement provides that UNSW “will appoint staff on terms which correspond with one or the other of the title appointment prescribed in clauses 16.0-19.0”. Clause 15.0(c) of the Agreement provides that “nothing in clauses 16.0-19.0 to limit the number of or proportion of staff that University may employ the particular type of appointment.”

(b) Clause 16.0(a) provides for engagement of academic staff on continuing employment.

(c) Clause 17.0(a) provides for engagement of academic staff in fixed term employment.

13. Thus, there is nothing express in the agreement which prohibits the engagement of teaching focused role. It follows that the NTEU’s position in opposition to the engagement of teaching focused roles is based not upon an express provision contained in the Agreement, but on an implied prohibition, i.e., something that is not expressly stated. That requires words being read into the Agreement and defends the basic principles of interpretation set out above.

Engagement of “teaching focused roles” is consistent with provisions of the Agreement

14. UNSW further contends that parts of the Agreement are in fact, consistent with, and equally applicable to, engagement of academic staff on teaching focused roles.

15. First, one feature of the Agreement is the obligation on the parties to provide opportunities to improve job security for academic staff, where possible. This is set out in clause 15.0(f) which provides that ‘the parties recognise the importance of providing opportunities for continuing and fixed-term employment wherever possible in order to improve the level of job security within the University’.

16. Meeting UNSW’s increased teaching needs with fixed term or continuing employees instead of casual employees is consistent with this clause of the Agreement.

17. Further, clause 15.0(g) of the Agreement provides that:

During the term of this Agreement, the University will seek to increase the number of continuing and fixed-term positions across the University to carry out the work that would otherwise be undertaken by casual employees. A variety of merit based recruitment initiatives may be used including positions specifically for early career academics and positions specifically for postgraduate students.

18. Consistent with clause 19.1 and schedule 2 of the Agreement, casual employees employed under the Agreement are employed to undertake teaching or teaching related work only (i.e. not research work) including lectures, tutorials, demonstrations and marking.

19. Again, a proposal by UNSW to meet its increased teaching needs with fixed term or continuing employees instead of casual employees is consistent with these clauses of the Agreement.

20. Second, the advertisements issued by UNSW indicate that academic staff are to be engaged on teaching focused roles on the basis of fixed term appointments, which is entirely consistent with clause 17.0 of the Agreement. Clause 17.0(c) and (d) set out a number of circumstances in which UNSW may offer fixed term contracts. Clause 17.0(c) provides that ‘fixed term appointments shall generally be limited to work activity that comes within the description of one or more of the following circumstances’ [listed in the subcategories in clause 17.0(c)] including but not limited to the following:

(a) to work on a specific task or project where a definable work activity has a starting time and which is expected to be completed within an anticipated timeframe: clause 17.0(c)(i);

(b) to work in a position funded from the Strategic Priorities Fund of the University or to work in a new organisational area, function or program where the prospective need or demand for which is uncertain or unascertainable at the time of establishment of the new area, function or program, in which case fixed-term employment may be offered for a total of up to three years: clause 17.0(c)(iv);

(c) to work in an academic unit where there is a sudden unanticipated increase in enrolments in which case fixed-term employment may be used for a total of up to three years: clause 17.0(c)(v);

(d) to work in an area that is performing one or more functions or teaching one or more programs which will cease within a reasonably certain time. Where part or all of an organisational unit is to be disestablished, staff may be employed on a fixed-term contract for a total of up to two years: 17.0(c)(vi), or

(e) to undertake work where a curriculum in professional or vocational education requires that the work be undertaken by a staff member who has recent practical or commercial experience, in which case a staff member may be employed on up to three successive fixed-term contracts within a total period of employment of up to three years: 17.0(c)(x).

21. UNSW submits that each of the above circumstances would apply to the recruitment and engagement of teaching focused roles, depending upon the different facts.

22. Similarly, clause 17.0(d) of the Agreement provides for “convertible tenure track contracts” whereby ‘the position is offered for a period of between 3 and 5 years on the basis that the University will, at the expiration of the contract, convert the employment from fixed-term to continuing employment’ unless performance expectations have not been met or there is insufficient productive work. UNSW considers that convertible tenure track contracts could be relevant to teaching focused roles depending on the factual circumstances.

23. Third, the position classifications contained in the Agreement are consistent with the engagement of academic staff on teaching focussed roles.

24. Specifically, item (a) of Schedule 3 of the Agreement provides that:

The UNSW Position Classification Standards (PCSs) in this [sic] Schedule [Schedule 4] of the Agreement describe the broad categories of responsibilities associated with continuing and fixed-term employment at different levels. The standards are not exhaustive of all tasks in

academic employment, which is by its nature multi-skilled and involves an overlap of duties between levels. [underlining added]

25. Schedule 4 of the Agreement sets out the general standard, specific duties and skill base of each of the Levels A – E. For each Level, the specific duties required are not expressed as mandatory and exhaustive, and are prefaced with ‘may include’. For example:

LEVEL C (SENIOR LECTURER)

General Standard

A Level C academic is expected to make significant contributions to the teaching effort of a department, school, faculty or other organisational unit or an interdisciplinary area. An academic at this level is also expected to play a major role in scholarship, research and/or professional activities.

Specific Duties

Specific duties required of a Level C academic may include:

- *The conduct of tutorials, practical classes, demonstrations, workshops, student field excursions, clinical sessions and studio sessions.*
- *Initiation and development of course material.*
- *Course coordination.*
- *The preparation and delivery of lectures and seminars.*
- *Supervision of major honours or postgraduate research projects.*
- *Supervision of the program of study of honours students and of postgraduate students engaged in course work.*
- *The conduct of research.*
- *Significant role in research projects including, where appropriate, leadership of a research team.*
- *Involvement in professional activity.*
- *Consultation with students.*
- *Broad administrative functions.*
- *Marking and assessment.*
- *Attendance at departmental and/or faculty meetings and a major role in planning or committee work.*

Skill Base

A Level C academic will normally have advanced qualifications and/or recognised significant experience in the relevant discipline area. A position at this level will normally require a doctoral qualification or equivalent accreditation and standing. In determining experience relative to qualifications, regard will be had to teaching experience, experience in research, experience outside tertiary education, creative achievement, professional contributions and/or to technical achievement. In addition a position at this level will normally require a record of demonstrable scholarly and professional achievement in the relevant discipline area. [underlining added]

26. It is UNSW’s position that each of the classifications is sufficiently flexible to permit UNSW to appoint academics to roles which are research focused or teaching focused, on either a continuing basis (for a defined period) or a fixed term basis, in accordance with the applicable provisions of clauses 16.0 or 17.0 of the Agreement.

27. Consistent with this submission, in practice, UNSW extensively employs research-focused academics, on both fixed term and continuing bases. The NTEU has never opposed this mode of engagement.

28. Fourth, and importantly, the Agreement actually provides flexibility to UNSW to enter into agreements with teaching and research academics to perform a teaching focused role for a defined period, including from commencement. Item (c) of Schedule 3 provides amongst other things:

It is recognised that at a given point in an academic career, an employee may agree with their supervisor to perform a predominantly teaching or research role for a defined period due to the performance strengths or preferences of the employee. In entering into any such

agreement with an early career academic, the University will take into account the need for that employee to establish a research profile.

29. Item (c) of Schedule 3 thereby permits UNSW to negotiate specific teaching arrangements with a successful candidate during the recruitment process, and to reach agreement with the candidate about those arrangements either during the recruitment process (to take effect on commencement) or with the successful candidate/staff member at any time on or after their first day of employment.

30. While the Agreement does not require it, as a matter of good human resources practice and so as not to misrepresent the nature of the role, 3 of the 4 job advertisements which are the subject of this dispute note that UNSW wishes to negotiate and agree on specific teaching arrangements with successful candidates.

31. This approach is entirely consistent with the Agreement.

32. Finally, and also importantly, the engagement of teaching focused roles is entirely consistent with clause 24.0 of the Agreement which deals with workload allocations. Any candidate for the role, once employed, will receive the benefit of the workload model developed through the collegial, equitable and transparent process described in clause 24.2(a) of the Agreement. These include express provisions requiring:

(a) A quantifiable maximum on teaching contact hours, consistent with clause 24.2(d) and (e); and

(b) Adjustments for higher or lower workloads in the following year or other alternative period – clause 24.2(h).

33. The workload clause in the agreement contains specific provisions in relation to teaching focused academics (employees who have agreed to perform a predominantly teaching role for a defined period) being that:

(a) where ‘an agreement has been made in accordance with clause (c) of Schedule 3 for an employee to perform a predominantly teaching role for a defined period, the maximum teaching contact hours... may be exceeded on a proportional basis’: clause 24.2(f); and

(b) an employee who has reached an agreement under 24.2 (f) can be ‘required to teach in more than two teaching sessions per year in any 12-month period. Where an employee agrees to teach in more than two sessions, compensation through workload allocation or salary will be provided to the employee’: clause 24.3(f).

34. The specific teaching arrangements discussed by UNSW – either with the candidate during the recruitment process (to take effect on commencement) and/or with the successful candidate/staff member at any time on or after their first day of employment – will include information about the applicable workload allocation model, consistent with the requirements of clause 24 of the Agreement.

35. For all of the above reasons, UNSW’s proposed course is not inconsistent with the Agreement.”

Respondent

[20] On 6 December 2016 the NTEU respondent submitted that:

“2. The Applicant sought to advertise a ‘teaching focused position’ (see Applicants submissions 22 November 2016, Ward statement 1, Tab A); a type of appointment which does not exist in the Agreement, and is inconsistent with the terms of the Agreement, in particular the types of employment consistent with Clause 15 (a), which states that: ‘The University will employ staff on terms that correspond with one or other of the types of appointment prescribed in clauses 16.0-19.0’. There is no

type of ‘teaching focused’ appointment, in the text of the Agreement.

3. In addition, merely changing the name of a position held by an employee could not remove an employee from the coverage of an industrial instrument: *CSR Limited Officers’ Association v CSR Ltd (1997) 76 IR 310, 313*. Each academic employed to perform both teaching and research work has the benefit of Schedule 3, which provides a choice to the employee when considering a teaching focused role for a defined period.

4. The Applicant proposed a determination which is inconsistent with the terms of the Agreement, as per s739 of the *Fair Work Act*, and cannot be made by the Fair Work Commission. This section of the Act provides at s739 (5) that: [FWC must not make a decision inconsistent with an Act or instrument] Despite subsection (4), FWC must not make a decision that is inconsistent with this Act, or a fair work instrument that applies to the parties.’ The Respondent submits that the Applicants determination is inconsistent with the terms of the instrument, the Agreement; and specifically inconsistent with Clause 15.0-19.0; Clause 5, Clause 24, and Schedule 3.

....

6. The Applicant’s proposed determination is inconsistent with the terms of the agreement generally, and specifically inconsistent with terms of Clause 5, 15.0-19.0, 24 of the Agreement, and Schedule 3 of the Agreement.

7. Clauses 15.0-19.0 ensures that the University will employ staff on terms that correspond to the types of appointment in clauses 16.0-19.0. In recognition of growing insecure work at the University, the University committed to, at Clauses 15.0 (g) and (h), ‘increase the number of continuing and fixed term positions across the University’ by way of ‘a variety of merit based recruitment initiatives may be used including positions specifically or early career academics and positions specifically for postgraduate students’, and ‘The University’s aim is to make 30 such appointments over the life of the Agreement. The parties agree to meet at the midpoint of this Agreement upon request to determine if the University is on track to make this number of appointments, and, if not, to discuss steps that could be taken to help achieve this aim.’

8. The Respondent notes that these appointments must clearly be made ‘on terms that correspond with one or other of the types of appointment prescribed in 16.0-19.0.’ There are nineteen types of appointment which correspond with the types of appointment prescribed in 16.0-19.0. By the plain and ordinary language used in the text of clauses 16.0-19.0, there is no type of employment which corresponds with ‘education focused’ or ‘teaching focused’ appointments.

....

9. The answers to all three elements of this question the Applicant puts to the Commission is [no]⁷. The form and content of the Agreement (as per paragraph 41.8 *The Australasian Meat Industry Employees Union v Golden Cockerel Pty Ltd (C2014/5227)* ‘Golden Cockerel’); by way of such as clear clauses such as Clause 15.0-19.0, Clause 5, Clause 24 and Schedule 3 of the Agreement, and the antecedent provisions of these relevant provisions of the Agreement; demonstrate that the text of the Agreement prohibits the Applicant from advertising roles for teaching focused academics, engaging teaching focused Academics for a defined period or; allocating teaching focused duties to Academic staff (with their agreement) for a defined period, having advertised for such roles. The Applicant can, clearly, propose a teaching focused role to an employee, employed to perform both teaching and research work, consistent with the provisions of Schedule 3 (c).

10. The Agreement applies to all employees identified in the Clause 5 Application, subject to the exclusions in Clause 5.2. There is no position called ‘teaching focused’ within the Agreement, and the Applicant incorrectly conflates ‘position’ or ‘appointment’ with a temporary ‘role’, or allocation of

⁷ The original submission was “yes”. However, that was in the context of the question being posed being in the negative. It was changed to a question posed in the affirmative.

work, provided for in the Agreement. Types of appointment are outlined in the Categories of Employment Clauses as ongoing employment consistent with Clause 16, fixed term employment consistent with Clause 17, continuing (contingent funded research) employment consistent with Clause 18, or casual employment consistent with the terms of Clause 19. Clause 15.1 clearly provides that, 'the University will employ staff on terms that correspond with the following types of appointment proscribed in Clauses 16-19.' The Agreement at Clause 15.1 and elsewhere prohibits any other type of appointment, and the Agreement applies to all Academic employees consistent with Clause 5, unless excluded by Clause 5.2.

11. Schedule 3 (c) applies to all employees unless expressly excluded. An employee could be excluded by the explicit exclusions of Clause 17.6, or Clause 18, which applies to research staff funded directly by research funding, and these research employees have the benefit of Schedule 3 (d): 'A research only employee will be appointed to a level at least consistent with "Guidelines for Appointment of Academic Research Staff" which were in place on the day before the commencement of the Agreement.' There is no dispute between the parties as to the engagement of research staff, consistent with the terms of the Agreement.

12. Workload allocation is regulated by Clause 24 Academic Workloads, and temporary roles to provide for a longer term allocation of academic work, but still for a defined period of time, are provided for in Schedule 3 (c).

13. The Applicant demonstrates in the Applicants' particulars of the dispute that the Applicant seeks to incorrectly apply the terms of the Agreement by denying an academic employed to perform both teaching and research employee the entitlement to say no to a teaching focused role for a defined period of time, an entitlement every teaching and research Academic has the benefit to arising from Schedule 3 (c) of the Agreement, unless excluded from Schedule 3 (c).

....

16. The Applicant is incorrect, as the Application clause is relevant to this dispute application, as Clause 5.2 clearly outlines which clauses do not apply to particular categories of staff. All other clauses apply to all Academic staff engaged consistent with Clause 5, unless explicitly excluded. Schedule 3 applies to all 'Academic employees employed to do both teaching and research.' Employees employed as 'research funded' staff as described in Clause 18, and in Schedule 3 (d). The explicit exclusion of Schedule 3 (c) is contained in the text of the Agreement, in Clause 17.6 Post Graduate Fellowships. All other Academic employees 'employed to do both teaching and research' hold the benefit of the application of Schedule 3 (c) except employees engaged in accordance with Clause 17.6.

17. Schedule 3 (c) entitles Academic employees 'employed to do both teaching and research' to make a choice about teaching focused roles for a defined period of their Academic employment, at Schedule 3 (c):

'(c) Academics employed to do both teaching and research can expect to make a contribution to a diversity of functions within the University. Such functions include teaching, research, participation in professional activities and participation in the academic planning and the governance of the University. The balance of the functions will vary according to level and position over time. All teaching and research academic staff will be provided with the opportunity to undertake the full range of academic duties commensurate with the classification level to which they have been appointed. It is recognised that at a given point in an academic career, an employee may agree with their supervisor to perform a predominantly teaching or research role for a defined period due to the performance strengths or preferences of the employee. In entering into any such agreement with an early career academic, the University will take into account the need for that employee to establish a research profile.'

18. The applicant has misconstrued the provisions of the agreement, in particular Clauses 5, 15.0-19.0, 24 and Schedules 3 and 4 as cited in their particulars at paragraph 3; and indeed has not seem to have

read the clear provisions of the Agreement by way of Clause 5 Application, and Clause 5.2 Exclusions from the Agreement. For employees not named in Clause 5.2, unless they are clearly excluded from the application of Schedule 3, Schedule 3 applies. There is only one type of employee expressly excluded from Schedule 3 (c) specifically, and that is employees appointed on terms with Clause 17.6.

19. Separate from the exclusions listed in Clause 5.2, Schedule 3 applies to all Academics employed to do both teaching and research. There are two kinds of employees not employed to do both teaching and research as provided for in Schedule 3 of the agreement. The first category of employee is a research only employee, who are engaged by Clause 18 and Schedule 3 (d), and by definition are not employed to do both teaching and research. The second type of employee is a Post-graduate Fellowship employees, provided for in Clause 17. 6, whose engagement specifically excludes the application of Schedule 3 (c).

....

21. Research employees engaged by Clause 18 are excluded from Schedule 3 (c) as their range of duties is clearly not a teaching and research range of duties, as identified by Schedule 3 (d), in Schedule 3 below....

....

22. The Agreement provides all employees work across range of academic duties (Schedule 3), appropriate to the classification level they were appointed to (Schedule 4).

23. In summary, the Agreement excludes two types of employees from the application of Schedule 3 (c): 'research staff' in Clause 18 and Schedule 3 (d), and Post Graduate Fellowship employees (at Clause 17.6).

24. Significantly, the Applicant asserts that the exclusions found in Clause 5.2 are not relevant to their Application; and does not in any part of their particulars or submissions draw the Commissions attention to the only explicit exclusion of Schedule 3 (c) in the Categories of Employment clauses (Clauses 15.0-16.0), Research Staff who rely upon Schedule 3 (d), and Post Graduate Fellowship employees who are explicitly excluded from the application of Schedule 3 (c).

25. The form and content of the agreement (as per paragraph 41.8 Golden Cockerel) ensures the exclusions from the Agreement are clear, by the aptly named Clause 5.2 Exclusions from the Agreement. This clause makes clear what employee is excluded from which clauses of the Agreement,....

26. Teaching and research academic staff are clearly not listed in this list of employees excluded from particular provisions, except for employees in receipt of more than \$250,000. Significantly, these employees are not excluded from the application of Schedule 3 (c).

27. While the Applicant has incorrectly conflated the types of Academic appointment consistent with the Agreement, with an academic role that a current employee can choose to perform for a 'defined period of time', the text of the Agreement clearly regulated the types of employment available, and states in Clause 15 at 15 (a):

The University will employ staff on terms that correspond with one or other of the types of appointment prescribed in clauses 16.0 – 19.0.

28. Those types of employment are continuing employees, fixed term employees, casual employees and research grand funded continuing contingency employees. 'Continuing contingency' employees is a more secure employment category for research only staff on 'research funded' grants.

29. In the above types of employment, the types of employment where Schedule 3 (c) does not apply, is Post Graduate Fellowship employees, a type of fixed term employment for post-graduate students, and research only employees, being engaged as a 'research only' employee by Clause 18 and Schedule

3 (d), an employee is clearly not employed to do both ‘teaching and research’. To all employees who are employed to do both ‘teaching and research, Schedule 3 (c) applies.

30. The Applicant in their particulars seeks a determination inconsistent with the terms of the agreement. The Applicant seeks to ventilate an alternate meaning inconsistent with the terms of the agreement, and this should be denied (*Norwest Beef Industries v Australian Meat Industry Employees Union* (1984) 12 IR 314, 331 (Olney J) (‘Norwest Beef Industries’).”

Applicant’s Reply

[21] On 13 December 2016 UNSW submitted, by way of reply, that:

“3. The NTEU Submissions contain a number of assertions about UNSW’s position which are inaccurate and disclose an apparent misunderstanding of UNSW’s case.

4. First, there has been no suggestion by UNSW that the Agreement would not apply to the staff in teaching focused roles. The NTEU Submissions to the contrary are incorrect. For the avoidance of doubt, UNSW maintains that any staff engaged by it in teaching focused roles will be covered by and have the benefit of the Agreement.

5. Second, the points made by UNSW as to the UNSW Act and By-Law are not relied on by UNSW to assert that the Agreement does not apply to academic staff (NTEU Submissions [51]). Rather, the purpose of the references to those provisions is to provide context to the power UNSW has to employ staff. The ability to employ comes from the UNSW Act and By-Law and the Agreement regulates the terms of that employment.

6. Third, it is not correct to assert that UNSW is attempting merely to change the name of a position to remove staff from the coverage of the Agreement (NTEU Submissions [4], [24]-[36]). As noted above in [4], it is UNSW’s contention, and UNSW accepts, that any staff so employed will be covered by the Agreement.

7. Fourth, for the avoidance of doubt, UNSW says that the advertising of, and appointment to, teaching focused roles is consistent with, and permitted by the Agreement, and that the Agreement regulates the terms on which such roles can be offered.

8. UNSW says, in particular, that the engagement of staff in teaching focused roles is consistent with and complies with:

- (a) clauses 15.0 – 19.0 – see UNSW Submissions [20]-[22]
- (b) clause 24.0 – see UNSW Submissions [32]-[34]
- (c) Schedule 3 – see UNSW Submissions [28]-[31], and
- (d) Schedule 4 – see UNSW Submissions [23]-[27].

9. Fifth, UNSW rejects the assertion that it is seeking to deny academic staff the benefit of Schedule 3(c) (NTEU Submissions [18]). It is UNSW’s position that any such appointments would be consistent with Schedule 3(c) and it would be open to an academic staff member to decline an offer of a teaching focused role (NTEU Submissions [66]), consistent with Schedule 3(c). UNSW accepts that it cannot require an academic staff member to perform a teaching focused role without his or her agreement.

10. The comparison relied on by the NTEU at [65] is not an appropriate one; the Agreement does not permit UNSW to offer employment at a particular classification and then pay the staff member less than the pay rate for that classification. However, the Agreement does permit UNSW to offer employment to an academic staff member and reach agreement with them to perform a predominantly

teaching role for a defined period.

11. The NTEU agrees that an offer of a predominantly teaching role for a defined period can be made by UNSW on the staff member's commencement (NTEU Submissions [66]). UNSW says that the terms on which such an offer would be made can be discussed with a candidate during recruitment. This is consistent with other matters dealt with under the Agreement that are discussed with candidates during recruitment and then recorded in their offer letter.

12. For example, a candidate might request particular annual leave arrangements (clause 31 of the Agreement) or terms in respect of a Special Studies Program (clause 38 of the Agreement). During recruitment for an academic managerial role, such as a Head of School, UNSW discusses and negotiates with a candidate the work activities the academic will undertake, that is, the relative contributions to teaching, research and service that are expected.

13. This practice does not mean that UNSW is requiring an academic staff member to agree to give up an entitlement under the Agreement, contrary to the NTEU Submissions at [67].

Evidence of objective background facts

14. UNSW relies on the evidence of the NTEU's claim during the last bargaining round for provisions dealing with 'Scholarly Teaching Fellows' (Ward Statement [19]-[34]) in support of its submission that both parties understood, and now understand, that teaching focused roles were at that time, and are still, permitted by the terms of the Agreement. It is UNSW's submission that this evidence is admissible as evidence of this objective background fact: *AMIEU v Golden Cockerel Pty Limited* [2014] FWCFB 7447 (27 November 2014) at [25], contrary to the NTEU Submissions at [34]-[35] and [42]-[43].

15. The stated purpose of the Scholarly Teaching Fellows was to replace casual academic staff performing teaching (Exhibit Ward 1, pages 70-71). By seeking to limit the advertising of 'teaching-only or teaching focused positions other than Scholarly Teaching Fellow positions' (NTEU Submissions [38]), the NTEU implicitly acknowledged that UNSW could and can do so. This is the case notwithstanding that UNSW did not agree to the NTEU's claim for Scholarly Teaching Fellows.

Authorities relied upon by the NTEU

16. In its submissions, the NTEU relies on a number of authorities from Federal and State jurisdictions. Some of these authorities are misplaced because, for the reasons stated above, UNSW does not contend that the Agreement does not apply to the staff.

17. The NTEU's reliance on authorities also appears to suggest that UNSW's approach amounts to an 'opt out' from the Agreement. Again, this is not correct because UNSW is not making that submission.

18. Other authorities relate to the extent to which extraneous material can be used to assist interpretation. There are also more historical cases (including High Court cases) which appear to no relevance to the current dispute.

19. UNSW accepts that the relevant principles are accurately stated in *Golden Cockerel* at [42] and says that it these principles which should be applied.

Other matters raised in the NTEU Submissions

20. UNSW refers to the NTEU Submissions at [62]. Clause 17.0(a) of the Agreement does not require UNSW to specify in a job advertisement the category of fixed term set out in clause 17.0(c) and (d); rather, this is specified in an offer of employment.

21. UNSW rejects the NTEU's assertion, made without any legal basis, that UNSW's application is mischievous, potentially vexatious or without a reasonable cause (NTEU Submissions [97]).

22. Casuals are not employed to undertake research work (see clause 19.1(d) of the Agreement), contrary to the NTEU Submissions at [102] and [103].

23. UNSW acknowledges the NTEU Submissions at [108]-[116] regarding antecedent agreements. As stated above, UNSW does not say that Schedule 3(c) does not apply to the advertised teaching focused roles.”

Consideration

[22] The essential or primary argument of UNSW that, it says, allows it to advertise (and appoint prospective employees to) teaching focussed roles is that “nothing in the Agreement prevents it.”⁸

[23] It is common ground that in the Agreement there is no express:

- a) category of “teaching focussed academic” (TFA); nor
- b) prohibition on the employment of a TFA.

[24] However, to focus exclusively on what is expressly in or not in an enterprise agreement misses the point of how an enterprise agreement is to be interpreted. That is not to say there needs to be a reliance on implied terms either.

[25] First, I conclude that the Agreement, and in particular clauses 5, 15-19, 24 and Schedule 3 have plain meanings and contain no ambiguity:

- a) Clause 5 clearly provides for the coverage of the Agreement. It covers the UNSW and its employees. That does not mean that it gives UNSW free reign in relation to what it can agree with prospective employees. It does not provide a licence to undermine terms and conditions of the Agreement enjoyed by employees through agreements between UNSW and prospective employees.
- b) Clause 5.2 in particular lists those who are not covered by the Agreement. It does not provide for an exclusion of TFAs. To the extent that clause 5.2 makes express reference to certain things being excluded, others are omitted from that list (i.e. not excluded from operation of the Agreement). The same *expression unius est exclusion alterius* principle applies throughout the Agreement.
- c) Clause 5 in this regard operates as an exclusive code in the application of the Agreement. Plain words are used. There is no ambiguity. The Agreement means what it says.
- d) Clause 15(a) underscores the code like nature of what is permissible under the Agreement. It provides that “The University will employ staff on terms that correspond with one or other of the types of appointment prescribed in clauses 16.0 – 19.0.” (emphasis added). This means that UNSW can only employ staff as
 - a:
 - i. full-time or fractional-time basis employee;
 - ii. continuing employee (clause 16);
 - iii. fixed term employee (clause 17);
 - iv. continuing (contingent funded research) employee (clause 18); or
 - v. casual employee (clause 19).

⁸ Exhibit “A2”, para 2.

- e) It is to be noted that clauses 16.0 – 19.0 refer to the basis upon which employees can be engaged. These clauses are exclusively about the particular type of appointment. They do not refer to the work to be undertaken by those employees (i.e. their classification, e.g. academic, teaching focused, academic/teaching focused). It is clear that nothing in those clauses limits the number or proportion of staff that UNSW may employ in a particular type of appointment. However, that licence to vary the number or proportion of staff in a particular type of appointment does not extend to the classification of the employee.
- f) Clause 24 in relation to academic workloads clearly states that it does not apply to a casual employee. By definition therefore it applies to all staff who are not casual employees. This does not mean that a term has been implied into the Agreement. Rather, it is an orthodox way of interpreting an enterprise agreement. It necessarily follows, therefore, that the academic workload clauses must apply to the category of employees in clauses 15.0 – 19.0. This includes fixed term employees (noting that UNSW proposes that TFAs be fixed term employees). That means they are entitled to have a workload formula in place in their Academic Unit that is developed through a collegial process and which is equitable and transparent. A TFA would be denied the benefit of the application of a workload formula to them.
- g) Schedule 3(c) is also clear in its terms,

“(c) Academics employed to do both teaching and research can expect to make a contribution to a diversity of functions within the University. Such functions include teaching, research, participation in professional activities and participation in the academic planning and the governance of the University. The balance of the functions will vary according to level and position over time. All teaching and research academic staff will be provided with the opportunity to undertake the full range of academic duties commensurate with the classification level to which they have been appointed. It is recognised that at a given point in an academic career, an employee may agree with their supervisor to perform a predominantly teaching or research role for a defined period due to the performance strengths or preferences of the employee. In entering into any such agreement with an early career academic, the University will take into account the need for that employee to establish a research profile.”
(emphasis added)

- h) It is important to note some of features of Schedule 3(c) which applies to (almost) all employees,
 - i. it applies to, and presupposes, employees which “do both teaching and research”,
 - ii. there will be a balance of functions (not usually an absence of them),
 - iii. there is one basis for an employee and their supervisor agreeing on a predominantly teaching or research role (i.e. for the benefit of the employee given the point they are in their career),
 - iv. presupposes that the “defined period” is limited and, thereafter the employee will return to a balance of functions.

[26] In its written submissions and during the hearing UNSW has consistently failed to engage with the exclusive nature of the words contained in the Agreement. The Agreement is not drafted using illustrative language such as “includes” or “such as”. The Agreement contains exclusionary language. For example, Schedule 3(c),

- provides,

at a given point in an academic career, an employee may agree with their supervisor to perform a predominantly teaching or research role for a defined period,

- does not provide,

at a given point in before the commencement of an academic career, ~~as~~ a prospective employee may agree with their future supervisor to perform a predominantly teaching ~~or research~~ role for a defined period fixed term.

[27] Schedule 3(c) requires,

- a) a point in time during an academic career,
- b) an existing employee, and
- c) a defined period (before return to a balance of functions).

[28] Because the Agreement has a plain meaning, no evidence of the surrounding circumstances has been admitted to contradict the plain language of the Agreement. Further, the Commission, as presently constituted, has not had regard to evidence of the surrounding circumstances to aid it in the interpretation of the Agreement.

[29] Having regard to the plain meaning of the words in the Agreement I adopt the submissions of the NTEU that “the Agreement at clause 15.1 and elsewhere prohibits any other type of appointment, and the Agreement applies to all academic employees consistent with clause 5, unless excluded by clause 5.2” (which, it is common ground, does not refer to teaching focused academics). Further, “separate from the exclusions in clause 5.2, Schedule 3 applies to all academics employed to both teaching and research.” As the NTEU has correctly identified “the Agreement excludes two types of employees from the application of Schedule 3(c), “research staff” in clause 18 and Schedule 3(d), and Post Graduate Fellowship employees (at clause 17.6).”

[30] In adopting the construction advanced by the NTEU, I reject the submissions of UNSW that just because the Agreement doesn’t say they can’t engage TFAs as a condition of appointment, the UNSW is allowed to do so. To adopt the construction advanced by UNSW would defeat the purpose of the Agreement and, in particular, those clauses relating to academic workloads and Schedule 3. It would result in the UNSW being able to restrict academics (as a condition of employment) from undertaking a full range of academic duties consistent with the agreement such as teaching, research, participation in professional activities and participation in the academic planning and the governance of UNSW. Such a restriction is not permissible under the Agreement.

[31] I am satisfied that the objective intention of the parties to the Agreement must have been to have the Agreement operate as a code, to provide predictability and certainty about the types of employment which can be entered into, academic workload and how teaching focussed or academic focussed roles are to be agreed upon.

[32] Nothing in the Agreement prevents UNSW from legitimately negotiating with an existing employee such that, for a defined period, they perform a teaching focused role. However, it does not follow that UNSW can negotiate the same outcome with a prospective employee.

[33] To the extent that UNSW relies upon the UNSW Act and By-laws it again misses the point. The federally approved Agreement prevails. It curtails the powers exercisable by UNSW. It cannot exercise those powers in a fashion that undermines the intent of the

Agreement and the terms and conditions that existing employees enjoy under the Agreement.

[34] In coming to this decision I make no comment about the desirability or otherwise of TFAs. UNSW may have an increase in its teaching needs which are best suited by TFAs being employed on a fixed term basis. It might be argued that this is preferable to engaging more casual employees and consistent with the aspirations in the Agreement to do so. However, that is not what the agreement allows. UNSW negotiated the Agreement and it must be held to the deal it did. If it now wants to add a new category of employee (namely a TFA employed on a fixed term basis from the commencement of their employment) then it can seek to vary the Agreement to include this new category or seek to include the new category when it comes time to renegotiate the Agreement once it passes its nominal expiry date.

Conclusion

[35] Having regard to the these reasons, the agreed question can be answered as follows:

Does the UNSW Australia (Academic Staff) Enterprise Agreement 2005 permit UNSW to:

- a) advertise roles for teaching focussed academics,*
- b) engage teaching focussed academics for a defined period, or*
- c) allocate teaching focussed duties to academic staff (with their agreement) for a defined period (having advertised for such roles).*

Answer: To the extent that the question is directed to:

- prospective employees, the answer is “No”,
- existing employees, the answer is “Yes”.

[36] The only basis upon which teaching focussed academics can be engaged by UNSW is if they have already been first been employed in a category of employee provided for in the Agreement and then agreed to a teaching focused role for a defined period in accordance with Schedule 3(c).



COMMISSIONER

Appearances:

R Christmann, for The University of New South Wales

J Wells, for National Tertiary Education Union

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