



FairWork
Commission

RECOMMENDATION

Fair Work Act 2009

s.739—Dispute resolution

Flinders University

v

National Tertiary Education Industry Union
(C2018/6180)

COMMISSIONER PLATT

ADELAIDE, 6 DECEMBER 2018

Alleged dispute about any matters arising under the enterprise agreement and the NES;[s186(6)].

Summary

[1] On 2 November 2018 Flinders University (the University) lodged an application under s.739 of the *Fair Work Act 2009* (Cth) (the Act) concerning a dispute between the University and the National Tertiary Education Union (the Union) over organisational change at the University.

[2] The Flinders University Enterprise Agreement 2014-2017 applies to the workplace.

[3] A Conference was conducted on 7 November 2018. Mr Short (of Counsel) with Mr Barrett and Professor Pollock represented the University, Ms Bucheker (Industrial Officer) represented the Union with Dr Miller and Ms Fuller.

[4] No objection was raised in relation to whether the Commission has jurisdiction to deal with the dispute pursuant to s.739 of the Act.

[5] A decision¹ granting permission for the University to be represented pursuant to s.596 of the Act was published on 8 November 2018.

[6] In the representation decision at paragraph [2] I summarised the history of this matter.

[7] The dispute primarily concerns the restructure of a large number of academic positions covered by the Agreement. The restructure will result in a number of existing positions being abolished and/or changed with an increased number of “Teaching Specialist” and “Research Only” positions, and a reduced number of the existing “Balanced positions”.

[8] There was considerable dispute over whether the University was entitled to proceed with the restructure, if the positions were genuinely redundant, whether the terms of the Agreement were being complied with and the level of consultation with the workforce.

[9] The dispute was conciliated at the Commission on 14 November 2018 over the course of a day. The parties jointly worked towards an agreed position to resolve the dispute.

[10] On 19 November 2018 Ms Bucheker advised my Chambers that the parties had “agreed in principle to a settlement of all matters contained in both disputes”. On 20 November 2018 Mr Barrett advised on behalf of the University that “the parties have reached agreement on the terms of settlement for both disputes referred to below ((C2018/6394 and C2018/6180).” A copy of an executed Settlement Agreement was provided to the Commission.

[11] Whilst I do not propose to canvas the entirety of the Settlement Agreement (due to it being a product of a confidential conciliation) the agreed position in relation to the consultation and implementation of the proposed changes to the academic staff structure included the following:

- A statement that the Settlement Agreement was in full and final settlement of the disputes.
- The Settlement Agreement would provide for the continuation of the consultation process in each College within the University.
- There would be a provision for a non-binding process where impacted staff could provide an expression of interest in a voluntary redundancy, indicate a preferred “new” role or retain their current role.
- There would be a consideration of all the information collected through the expression of interest process by the University.
- The determination of the final academic staff structure for each College would be conducted by the University.
- A merits based selection process would be used where required.
- At the conclusion of the process, the University would determine any surplus Balanced positions and consider if any further recruitment were required.

[12] On 30 November 2018 the University advised that the Union had raised a dispute (in accordance with Clause A31 of the Agreement) concerning the academic restructure that was the subject matter of the previous Conciliation.

[13] The matter was listed for telephone conference on 3 December 2018 at 5:00pm. At the conclusion of the conference, the parties were directed to provide a summary of all issues between them by no later than 5:00pm on 4 December 2018 and their response by 11:00am on 5 December 2018.

[14] The University’s position is summarised as follows:

- Teaching Specialist and Research Only academic positions are not new roles.
- The Union is not honouring the Settlement Agreement and is seeking to delay the restructure.
- There is a need to move as expeditiously as possible so that staff and students have certainty for next year.

[15] The Union's position was summarised as follows:

- The workload expectations of Teaching Specialists and Balanced positions are ambiguous.
- The research performance expectations for Research Only roles are ambiguous.
- The documents distributed to staff contain inaccuracies, ambiguities and omissions.
- Casual employment is overused.
- The redundancies are not genuine.
- A 'siloed' approach has been taken to suitable work opportunities.
- Clarification is required in relation to the intellectual property status of research that staff may produce in their own time if they accept a Teaching Specialist role.
- The University has not provided a quantitative analysis on how the restructure will achieve its strategic goals.
- Partial disestablishment of a position is not industrially possible.
- Approved outside studies programs and Long Service Leave may be put in jeopardy.
- It is unclear what ATO code will be applied to the voluntary redundancy packages.

[16] On 5 December 2018 at 2:00pm Conciliation was facilitated by the Commission between the parties in an attempt to resolve the outstanding issues. Both parties provided a timeline for the completion of the implementation process.

[17] It was agreed that severance payments would be taxed as a genuine redundancy, and Long Service Leave that had been previously approved would be honoured unless deferred by mutual agreement.

[18] Some of the issues raised by the Union do not relate to this change process but appear to be wider issues (e.g. renegotiation of Clause C10 of the Agreement).

[19] Some of the issues (e.g. workload and performance expectations) were not able to be agreed in advance of the consultation process and will be subject to further discussion during the consultation period.

[20] Some of the issues appear to be unique circumstances which are not of general application (e.g. impact of outside studies program) – these matters will be the subject of further discussions during the consultation period on a case by case basis.

Observations

[21] For the avoidance of doubt, these are preliminary views expressed for the purpose of assisting the process, this is not a decision.

[22] The University's organisational change process has been communicated to effected academic staff and has been the subject of public comment. It is important that the process be completed as quickly as possible, so as to provide certainty for the effected staff, the University and its students.

[23] Some of the issues raised relate to legal questions that may give rise to individual applications for remedies under the Act. My preliminary view, based on the information to hand, is that the operational change being embarked upon by the University appears genuine.

[24] The majority of the issues relate to the provision of information, consultation and redeployment and should be able to be resolved through a structured communication process, recognising that the Act and the Agreement impose requirements in this respect. It is an important part of the consultation obligation that impacted employees are provided with as much information as is reasonably possible about their position and mitigation options, including alternative positions.

Recommendation

[25] Having consulted with the parties, and heard their respective positions as to the implementation process and timeline, I believe it is appropriate to issue a recommendation in the following terms.

1. The organisational change process should continue with some urgency with the aim of all employees being advised as soon as possible, of the proposed effect on their position, the conduct of a genuine consultation process, selection processes (where applicable) and the communication of final outcomes to effected employees.
2. The parties and affected employees should use the consultation process as an opportunity to share information, options and consider alternatives (including redeployment) so as to mitigate the impact of the change.
3. I recognise that the Christmas/New Year break will result in some delay and that some employees impacted may be on leave in January 2019. The parties and affected persons should use their best endeavours and all communication methods at their disposal to communicate proposals, to facilitate a two way dialogue and advise of outcomes. I accept that this may delay some of the recommended timelines.
4. The following timetable is recommended to the parties as a compromise between the positions advanced. All times detailed refer to South Australian time.
 - 5. The University will publish the final proposed structure for each college not later than 9:00am Wednesday 12 December 2018 and email the relevant structure to each academic staff member. The email must advise the academic staff member that if they wish to change their expressions of interest previously lodged, they must advise the University of their revised preferences by 9:00am on Friday 14 December 2018.
 - 6. All academic staff will then be advised in writing of the effect on the organisational change on their substantive role(s) and all information required to be provided in accordance with the consultation obligations not later than 5:00pm on Friday 14 December 2018.

7. The University will consult with effected employees (including those who have volunteered to be made redundant, those who will be subject to a merits based selection process, those who will be made an offer of employment in a different role, but not including those persons whose continued employment will subject to other outcomes) in the period between 14 – 20 December 2018. Consultation may occur earlier by agreement of individual employees and the University.
8. Any selection interviews and processes will be conducted (so far as is possible - noting that some persons may be unavailable) between 7 and 14 January 2019, provided that they may occur earlier by agreement between individual employees and the University.
9. Employees (other than those who are subject to other outcomes) will be advised in writing of the final outcome as to their employment and their individual consultation (and where relevant selection) processes by 16 January 2019, unless extenuating circumstances exist.
10. Those employees who were subject to other outcomes will be advised in writing of the proposed effect on them by 5:00pm 16 January 2019. Consultation will occur in the period between 16 – 22 January 2019 (or earlier by agreement) and any selection processes will be conducted in the period 23 – 30 January 2019 (or earlier by agreement). These employees will be advised of the final outcome as to their employment as their individual consultation (and where relevant selection) processes complete with the aim of advising final outcomes not later than 31 January 2019, unless extenuating circumstances exist.

[26] The parties are to confirm their acceptance of this recommendation by email to each other and the Commission by 5:00pm on 6 December 2018.



COMMISSIONER

Appearances:

A Short (of Counsel) on behalf of the Applicant

A Bucheker on behalf of the Respondent.

Conciliation details:

2018.

Adelaide.

5 December.

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¹ Flinders University v National Tertiary Education Industry Union [2018] FWC 6867 (the representation decision).