Federal Court of Australia

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NTEIU v University of Wollongong [2001] FCA 1069 (8 August 2001)

Last Updated: 8 August 2001

FEDERAL COURT OF AUSTRALIA

[2001] FCA 1069

NATIONAL TERTIARY EDUCATION INDUSTRY UNION AND DR EDWARD STEELE v UNIVERSITY OF WOLLONGONG

EXPLANATORY STATEMENT

1 In accordance with the practice of the Federal Court in certain cases of public interest, the judge who decided this case (Branson J) has prepared this statement to assist understanding of the decision of the Court. The statement is not intended to be a substitute for the Court's reasons for judgment which remain the only authoritative pronouncement of the Court.

2 In this case, the National Tertiary Education Industry Union ("the Union") and Dr Edward Steele applied to the Court for an interpretation of the University of Wollongong (Academic Staff) Enterprise Agreement 2000-2003 ("the Agreement"). The Agreement is binding on the Union, the University and the academic staff of the University. Section 413A of the *Workplace Relations Act 1996* (Cth) authorises, amongst others, an organisation bound by a certified agreement or an employee whose employment is subject to the agreement to make such an application.

3 In addition to an interpretation of the Agreement, the Union and Dr Steele sought other orders from the Court. The Court has not yet reached a decision as to whether those other orders, or any of them, should be made. It will not reach this decision until it has heard further from the legal representatives of the parties.

4 The Union and Dr Steele claimed that, on the proper interpretation of the Agreement, the University of Wollongong is not entitled to dismiss a member of its academic staff without following certain inquiry procedures for which clause 61 of the Agreement provides. The University argued that, on the proper interpretation of the Agreement, there was a class of serious misconduct for which the Vice-Chancellor could dismiss a member of the academic staff without notice and without following the procedures for which cl 61 of the Agreement provides. That class of serious misconduct, the University argued, was misbehaviour that goes to the essence of the employment contract.

5 The Court has concluded that the interpretation of the Agreement for which the Union and Dr Steele contended is the correct interpretation of the Agreement. It has made an order of interpretation accordingly,

6 This does not mean that the Court has reached any decision with respect to the conduct of Dr Steele upon which the University based its decision to terminate his employment. The appropriateness or otherwise of Dr Steele's conduct was not an issue before the Court. Nor was the Court required to address any issue touching on academic freedom or freedom of speech generally. The only issue on which the Court has ruled is an issue concerning the proper interpretation of the Agreement.

7 The reasons for judgment of the Court became available to the parties at the time that judgment was delivered and will be available to the public via the Federal Court's homepage at www.fedcourt.gov.au.

Federal Court of Australia

Sydney

8 August 2001

FEDERAL COURT OF AUSTRALIA

NTEIU v University of Wollongong [2001] FCA 1069

INDUSTRIAL LAW - interpretation of certified agreement - whether respondent entitled to dismiss a member of its academic staff summarily - whether certified agreement provides procedure to be followed prior to termination of

employment - distinction between termination without notice and the making of a decision to terminate without compliance with inquiry procedures - meaning of "serious misconduct" under certified agreement - meaning of "serious misconduct" within par 170CM(1)(c) of Workplace Relations Act 1996 (Cth)

WORDS AND PHRASES - "serious misconduct"

Workplace Relations Act 1996 (Cth) ss 413A, 170CM

Workplace Relations Regulations 1996 (Cth) reg 30CA

NATIONAL TERTIARY EDUCATION INDUSTRY UNION AND DR EDWARD STEELE v UNIVERSITY OF WOLLONGONG

N 582 of 2001

BRANSON J

SYDNEY

8 AUGUST 2001

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY N 582 of 2001

BETWEEN:	NATIONAL TERTIARY EDUCATION INDUSTRY UNION
	FIRST APPLICANT
	DR EDWARD STEELE
	SECOND APPLICANT
AND:	UNIVERSITY OF WOLLONGONG
	RESPONDENT
JUDGE:	BRANSON J
DATE OF ORDER:	8 AUGUST 2001
WHERE MADE:	SYDNEY

THE COURT ORDERS THAT:

1. Upon the true meaning and intent of clause 61 of the University of Wollongong (Academic Staff) Enterprise Agreement 2000-2003 ("the Agreement"), clause 61 prescribes the steps that are to be taken before the Vice-Chancellor takes disciplinary action against an academic staff member for reasons of unsatisfactory conduct, whether amounting to "misconduct" or "serious misconduct" within the meaning of the Agreement, including for reasons of misconduct of the kind envisaged by par 170CM(1)(c) of the *Workplace Relations Act 1996* (Cth).

2. Each party be at liberty on five days' notice to the other parties to have the proceeding relisted.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY N 582 of 2001

BETWEEN: NATIONAL TERTIARY EDUCATION INDUSTRY UNION

FIRST APPLICANT

DR EDWARD STEELE

SECOND APPLICANT

AND: UNIVERSITY OF WOLLONGONG

RESPONDENT

JUDGE: BRANSON J

DATE: 8 AUGUST 2001

PLACE: SYDNEY

REASONS FOR JUDGMENT

INTRODUCTION

8 By an application dated 14 May 2001 brought pursuant to s 413A of the *Workplace Relations Act 1996* (Cth) ("the Act") the applicants have sought an interpretation of the University of Wollongong (Academic Staff) Enterprise Agreement 2000-2003 ("the Agreement"). The issue which the applicants seek to have clarified by the interpretation sought is whether the University of Wollongong ("the University") is entitled under the Agreement to dismiss a member of its academic staff whom the Vice-Chancellor considers has engaged in serious misconduct of a kind envisaged in par 170CM(1)(c) of the Act without following the procedures provided for by cl 61 of the Agreement.

9 By their application the applicants have further sought an order for the imposition of a penalty on the University for an alleged breach of the Agreement, orders designed to ensure that the second applicant ("Dr Steele") is restored to the financial position that he would have been in had the University not purported to terminate his employment and certain declaratory orders.

10 For the reasons set out below, I have concluded that the Agreement is to be interpreted in the manner for which the applicants have contended. However, I have not considered it appropriate to formulate any additional orders without hearing further from counsel.

BACKGROUND FACTS

11 The following facts are agreed between the parties.

12 The first applicant ("the Union") is an organisation of employees registered pursuant to the Act. The University is a body corporate and capable of being sued. The Union and the University are parties to and are bound by the Agreement.

13 Dr Steele was employed as a member of the academic staff of the University from about February 1985 until the termination of his employment on 26 February 2001. At the time of the termination of his employment Dr Steele's employment was covered by the Agreement. Immediately before his summary dismissal he was receiving the remuneration provided for by step 4 of the Level D academic pay scale contained in Schedule 1 of the Agreement.

14 The Agreement was certified by the Australian Industrial Relations Commission on 8 November 2000. The nominal expiry date of the Agreement is 30 June 2003.

15 By letter dated 26 February 2001 the Vice-Chancellor of the University wrote to Dr Steele and advised him, amongst other things, that the Vice-Chancellor had come to the view that Dr Steele had engaged in serious misconduct and that his employment with the University was terminated effective immediately.

16 The University did not take any of the actions or follow the procedures provided for by cl 61 of the Agreement.

THE AGREEMENT

17 Clause 4 of the Agreement provides that the Agreement is binding according to its terms on the Union and the University and that it applies to all staff employed by the University in the classifications detailed in Schedules 4.1, 4.2 and 4.3 of the Agreement. The staff of the University whose employment is subject to the Agreement are referred to in the Agreement as "academics", "staff members" or "academic staff members". It was not suggested that any significance attaches to the use of these different expressions.

18 It is not in dispute that Dr Steele was employed in a classification detailed in Schedule 4.1 of the Agreement. That classification was "Level D". Clause 15 of the Agreement attaches the nomenclature "Associate Professor" to the academic level Level D.

19 Clause 14 of the Agreement is concerned with notice periods. Subclause 14.2 provides:

> *"14.2 The University must not terminate a staff member's employment unless:*
>
> *a.* the staff member has been given the required period of notice; or
>
> *b.* the staff member has been paid the required amount of compensation instead of notice; or
>
> *c.* where the staff member is guilty of serious misconduct, that is, misconduct of such a nature that it would be unreasonable to require the University to continue the employment of the staff member concerned during the required period of notice.
>
> A staff member must not resign from their employment unless the University has been given the required period of notice."

20 Subclauses 14.4 and 14.5 fix the required period of notice by reference to length of service and whether or not the staff member is over forty-five years old and has completed at least two years of continuous service with the University.

21 Part 7 of the Agreement, which comprises cls 59-62, is headed "Performance Management". Clause 59 is headed "Preamble". It relevantly provides as follows:

> *"59.1 Other than as provided for in Clause 28 (Probationary Appointments) and Clause 26 (Incremental Progression) all decisions to discipline or terminate the employment of an academic staff member can only be taken by the Vice-Chancellor in accordance with Parts 6 and 7 of this Agreement.*
>
> *59.2* The University must not terminate the employment of an academic unless the academic has been given notice and/or compensation as required under Clause 14 of this Agreement provided that the University may terminate without notice the employment of an academic found to have engaged in conduct of a kind envisaged in Section 170CM(1)(c) of the Australian Workplace Relations Act such that it would be unreasonable to require the University to continue employment during a period of notice;
>
> *59.3* ...
>
> *59.4* ...
>
> ***59.5* Definitions**
>
> *a.* `Termination of Employment' means termination of employment at the initiative of the University.
>
> *b.* `Disciplinary Action' means action by the University to discipline a member of academic staff for unsatisfactory performance, misconduct or serious misconduct and is limited to:
>
> * Formal censure or counselling;
>
> * Demotion by one or more classification levels or increments;
>
> * Supervision with or without pay;
>
> * Termination of employment;
>
> *c.* `Serious Misconduct' shall mean:
>
> * Serious misbehaviour of a kind which constitutes a serious impediment to the carrying out of an academic's duties or to an academic's colleagues carrying out their duties.
>
> * Conviction by a court of an offence which constitutes a serious impediment of the kind referred to above.
>
> * Serious dereliction of the duties required of the academic office.
>
> d. `Misconduct' shall mean conduct which is not serious misconduct but which is nonetheless conduct which is unsatisfactory."

22 Clause 61 of the Agreement is headed "Misconduct and Serious Misconduct". It relevantly provides as follows:

> *"61.1 Before the Vice-Chancellor takes disciplinary action against a staff member for reasons amounting to misconduct or serious misconduct, the Vice-Chancellor must take the steps in this clause, except that, where a matter which may involve misconduct or serious misconduct has been dealt with in good faith as if it were a case of unsatisfactory performance under Clause 60 of this Agreement, the procedures of this Clause are not required, but the provisions of Clause 60 of this Agreement, including notice periods and review procedures must be followed.*
>
> *61.2* Any allegation of misconduct/serious misconduct shall be considered by the Vice-Chancellor. If the Vice-Chancellor believes such allegations warrant further investigation the Vice-Chancellor shall:
>
> *a.* notify the staff member in writing and in sufficient detail to enable the academic to understand the precise nature of the allegations, and to properly consider and respond to them;
>
> *b.* require the staff member to submit a written response within 10 working days.
>
> 61.3 At the time of notifying the staff member in accordance with sub-clause 61.2 the Vice-Chancellor may suspend the staff member on full pay, or may suspend the staff member without pay if the Vice-Chancellor is of the view that the alleged conduct amounts to conduct of a kind envisaged in section 170CM(1)(c) of the Australian Workplace Relations Act such that it would be unreasonable to require the University to continue employment during a period of notice. Provided that:
>
> *a.* where suspension without pay occurs at a time when the staff member is on paid leave of absence the staff member shall continue to receive a salary for the period of leave of absence;
>
> *b.* the staff member may engage in paid employment or draw on any recreation leave or long service leave credits for the duration of the suspension without pay;
>
> *c.* the Vice-Chancellor may at any time direct that salary be paid on the ground of hardship;
>
> *d.* where a suspension without pay has been imposed and the matter is subsequently referred to a Committee, the Vice-Chancellor shall ensure that a Committee at its first meeting determine whether suspension without pay should continue and that Committee shall have the power to revoke such a suspension from its date of effect.
>
> *61.4* If the allegations are denied by the staff member and the Vice-Chancellor is of the view that there has been no misconduct or serious misconduct he/she shall immediately advise the staff member in writing, and may, by agreement with the academic, publish the advice in an appropriate manner.
>
> *61.5* If the allegations are admitted in full by the staff member and the Vice-Chancellor is of the view that the conduct amounts to misconduct or serious misconduct the Vice-Chancellor shall advise the staff member in writing of the Vice-Chancellor's decision and the operative date of the disciplinary action.
>
> *61.6* If the allegation is denied in part or in full or if the staff member has not responded to the allegations the Vice-Chancellor shall refer the matter to a Committee in accordance with the provisions of sub-clause 61.9, unless the Vice-Chancellor decides to take no further action or counsel or censure the staff member for unsatisfactory behaviour and take no other action.
>
> *61.7* During any period of suspension the staff member may be excluded from the University, provided that he or she shall be permitted reasonable access to the University for the preparation of his or her case and to collect personal property.
>
> *61.8* Nothing in this Agreement implies an inability to deny pay during a period of strike or lockout or where a staff member is not ready, willing and able to carry out duties.
>
> 61.9 Where a matter is referred to a Committee pursuant to sub-clause 61.6 the Vice-Chancellor shall convene the Committee within 10 working days where practicable.
>
> ...
>
> 61.10 The terms of reference of the Committee are to report on the facts relating to the alleged misconduct or serious misconduct, including whether any mitigating circumstances are evident.
>
> *61.10.1* The Committee shall provide a report to the Vice-Chancellor and the staff member as soon as is practicable following the conclusion of Committee proceedings.

61.10.2 On receipt of the report of the Committee, and having considered its findings on the facts related to the alleged misconduct or serious misconduct, the Vice-Chancellor may take disciplinary action. Where the disciplinary action is to terminate the academic staff member the academic staff member will be provided with notice or payment in lieu of notice as provided for under Clause 14 of this Agreement provided that the University may terminate without notice the employment of an academic found to have engaged in conduct of a kind envisaged in Section 170CM(1)(c) of the Australian Workplace Relations Act such that it would be unreasonable to require the University to continue employment during a period of notice.

61.10.3 If, having considered the Committee's findings on the facts relating to the alleged misconduct or serious misconduct, the Vice-Chancellor is of the view that there has been no misconduct or serious misconduct he/she shall immediately advise the staff member in writing, and may, by agreement with the staff member, publish the advice in an appropriate manner.

61.10.4 Where a staff member has been suspended without pay pending the decision of the Vice-Chancellor, then any lost income shall be reimbursed if there was no misconduct or serious misconduct. However, a decision taken by the Vice-Chancellor in his or her discretion not to dismiss or impose another penalty shall not be construed as an admission that there was no conduct justifying suspension without pay.

61.10.5 This clause in no way constrains the University from carrying out other or further investigations relating to the consequences of conduct of a staff member or former staff member when required in the public interest, eg inquiring into the truth of research results.

61.10.6 All actions of the Vice-Chancellor under this clause shall be final, except that nothing in this sub-clause shall be construed as excluding the jurisdiction of any external court or tribunal which, for this sub-clause, would be competent to deal with the matter."

SECTION 170CM OF THE WORKPLACE RELATIONS ACT

23 Section 170CM of the Act is in the following terms:

"(1) Subject to subsection (8), an employer must not terminate an employee's employment unless:

(a) the employee has been given the required period of notice (see subsections (2) and (3)); or

(b) the employee has been paid the required amount of compensation instead of notice (see subsections (4) and (5)); or

(c) the employee is guilty of serious misconduct, that is conduct of such a nature that it would be unreasonable to require the employer to continue the employment of the employee concerned during the required period of notice (see subsection (7))."

...

(7) Without limiting the generality of the reference to serious misconduct in paragraph (1)(c), the regulations may identify:

(a) particular conduct; or

(b) conduct in particular circumstances;

that falls within that reference.

...."

24 Regulation 30CA of the Workplace Relations Regulations 1996 (Cth) relevantly provides:

"(1) For paragraph 170CM(1)(c) of the Act, serious misconduct includes:

(a) wilful, or deliberate, behaviour by an employee that is inconsistent with the continuation of the contract of employment; and

(b) conduct that causes imminent, and serious, risk to:

(i) the health, or safety, of a person; or

(ii) the reputation, viability or profitability of the employer's business.

(2) For subregulation (1), conduct that is serious misconduct includes:

(a) the employee, in the course of the employee's employment, engaging in:

(i) theft; or

(ii) fraud; or

(iii) assault; or

(b) the employee being intoxicated at work; or

(c) the employee refusing to carry out a lawful and reasonable instruction that is consistent with the employee's contract of employment.

(3) Subregulation (2) does not apply if the employee is able to show that, in the circumstances, the conduct engaged in by the employee was not conduct that made employment in the period of notice unreasonable.

(4) For this regulation, an employee is taken to be intoxicated if the employee's faculties are, by reason of the employee being under the influence of intoxicating liquor or a drug (except a drug administered by, or taken in accordance with the directions of, a person lawfully authorised to administer the drug), so impaired that the employee is unfit to be entrusted with the employee's duty or with any duty that the employee may be called upon to perform."

SUBMISSIONS OF THE PARTIES

25 The applicants submitted that cl 61 of the Agreement provides a mandatory procedure that is to be complied with prior to the Vice-Chancellor taking disciplinary action against an academic staff member for reasons amounting to misconduct or serious misconduct. The applicants argued that subcl 59.2 does not give rise to a power to terminate the employment of an academic staff member which is independent of the procedure provided for by cl 61, but rather than subcl 59.2 is concerned with the period of notice, if any, that must be provided on the termination of the employment of an academic staff member.

26 The respondent submitted that the term "serious misconduct" has two different meanings in the context of the Agreement with each meaning being directed to a different kind of behaviour and a different set of circumstances. It argued that one meaning of "serious misconduct" is as specified in par 59.5(c) of the Agreement with the primary focus of this meaning being the capacity of an academic staff member to carry out his or her work as an academic. The second meaning, on the argument of the respondent, is the meaning of "serious misconduct" in s 170CM of the Act and reg 30CA of the Workplace Relations Regulations. This meaning, the respondent contended, is more extensive in is operation than the meaning specified in par 59.5(c) of the Agreement and goes to the essence of the employment contract between the employer and the employee by addressing the issues of fundamental importance to the existence and continuation of that contract. In the case of serious misconduct of this second kind, the respondent argued that subcl 59.2 of the Agreement permits an immediate termination of the contract of employment without there being any overriding requirement for compliance with cl 61 of the Agreement.

CONSIDERATION

27 The submissions of the respondent are based on the premise that, having regard to the proper construction of the definition of "serious misconduct" contained in par (c) of subclause 59.5 of the Agreement, "serious misconduct" within the meaning of cl 61 of the Agreement is a different kind of misconduct, or alternatively a narrower category of misconduct, than the misconduct referred to in par 170CM(1)(c) of the Act. The respondent argued that in the case of misconduct which is serious misconduct of the kind referred to in par 170CM(1)(c) of the Act, but which falls outside the definition of "serious misconduct" contained in the Agreement, subcl 59.2 of the Agreement allows for dismissal without notice and without regard to the procedures provided for by cl 61 of the Agreement.

28 A number of factors seem to me to tell against the above premise. The most compelling, in my view, is that par (d) of subcl 59.5 of the Agreement defines "misconduct" to mean *"conduct which is not serious misconduct but which is nonetheless conduct which is unsatisfactory"* . It must be accepted, in my view, that the reference in par (d) of subcl 59.5 to "serious misconduct" is a reference to serious misconduct as defined by par (c) of the same subclause. That is, within the meaning of the Agreement, the two expressions "serious misconduct" and "misconduct" cover the whole ambit of unsatisfactory conduct. Clause 61 of the Agreement provides for the steps which are to be taken before the Vice-Chancellor takes disciplinary action against a staff member for reasons amounting to either misconduct or serious misconduct. Termination of employment at the initiative of the University is a form of "disciplinary action" within the meaning of the Agreement (pars 59.5(a) and (b) of the Agreement). That is, having regard to the definitions contained in

subcl 59.5 of the Agreement, and the terms of cl 61 of the Agreement, the Agreement allows no scope for termination of employment at the initiative of the University by reason of unsatisfactory conduct other than pursuant to subcl 61.10.2 of the Agreement.

29 The second factor which tells against the premise on which the respondent's submissions are based is the generality of the nature of the misconduct envisaged by par 170CM(1)(c) of the Act and the similar generality of the definition of "serious misconduct" contained in subcl 59.5 of the Agreement. As is mentioned above, the respondent argued that the misconduct envisaged by par 170CM(1)(c) goes to the essence of the employment contract between the employer and the employee while the primary focus of the definition contained in subcl 59.5 of the Agreement is on the capacity of an academic to carry out his or her work as an academic. The respondent seemed to acknowledge the potential for overlap between the two kinds of misconduct. However, even more significant difficulties seem to me to attend the purported distinction. It is not readily apparent why misconduct going to the capacity of an academic to carry out his or her work as an academic would not ordinarily constitute misconduct going to the essence of an employment contract under which the academic is required to work as an academic. It may be for this reason that the purported distinction seems to be more easily articulated than illustrated. In my view the purported distinction tends to prove illusory when one seeks to apply it to particular factual circumstances. This point may be illustrated by reference to the evidence in this case. In his letter to Dr Steele of 26 February 2001 the Vice-Chancellor of the University summarised *"the recent course of events"* in the following numbered paragraphs:

> *"1. Various statements were attributed to you on 9 January of this year in the Sydney Morning Herald and other media outlets on following dates to the effect that you had been told/ instructed to increase the grades of honour students.*
>
> 2. When I asked you to provide to me details of these serious claims in my letter to you of 9 January, you verified the truth and accuracy of the reports but otherwise provided nothing substantiating those claims.
>
> 3. You chose to circulate internal correspondence about these matters very widely, outside the University, including your e-mails of 12 and 23 January.
>
> 4. During a Department meeting on 17 January (which at your request was tape recorded) you specifically denied the claims attributed to you in the media.
>
> 5. You were subsequently requested by your Department Head Associate Professor Walker to correct the public record accordingly and to take appropriate steps to repair the obvious damage your remarks had caused to the reputation of the University of Wollongong and your colleagues.
>
> 6. On 31 January you chose to respond to the request from Associate Professor Walker with a long letter (once again circulated very widely) in which, instead of taking any steps to correct the public record or lessen the damage your actions had caused, you chose to refer variously to `deeply flawed process of Honour's assessment', `sham process of Honour's assessment', and `shonky marking practices' despite the fact that the process had been endorsed at the meeting referred to above.
>
> 7. You also chose to forward your correspondence to the Deputy NSW Ombudsman who responded by dismissing your allegations."

30 The position classification standards for Level D contained in Schedule 4 of the Agreement include:

> "...
>
> *? 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;
>
> ...
>
> ? high level administrative functions;
>
> ? consultation with students;
>
> ? marking and assessment;
>
> ? attendance at departmental and faculty meetings."

Having regard to these standards, it seems to me that, if the matters summarised in the above paragraphs from the Vice-Chancellor's letter had been put before the Vice-Chancellor as allegations, he would have been entitled to regard

such allegations as allegations of " [s]*erious misbehaviour of a kind which constitutes a serious impediment to the carrying out of an academic's duties or to an academic's colleagues carrying out their duties*" within the meaning of the definition of "serious misconduct" contained in subcl 59.5 of the Agreement. Plainly enough, however, the Vice-Chancellor saw the conduct outlined in his letter as *"misconduct of such a nature that it would be unreasonable to require the employer to continue the employment of the employee concerned during the required period of notice"* within the meaning of s 170CM of the Act.

31 I conclude that the purported distinction between the kind of misconduct envisaged by par 170CM(1)(c) of the Act and misconduct defined as "serious misconduct" by subcl 59.5 of the Agreement is so vague and ill-defined that the construction of cl 61 of the Agreement for which the respondent contends would prove unworkable. Nothing in the language of the Agreement, in my view, suggests that the parties to the Agreement intended to incorporate this purported distinction into the Agreement.

32 Another significant factor which tells against the premise on which the respondent's submissions are based is the actual wording of subcl 59.2 of the Agreement. In my view, if one has regard to the plain meaning of the words used in subcl 59.2 of the Agreement, it can be seen that the subclause is concerned with the notice, if any, or compensation in lieu of notice, that is required to be given to an academic staff member before his or her employment is terminated. The words of the subclause do not suggest that it is concerned with the procedures which are to be followed before a decision is reached to terminate the employment of a staff member. This conclusion is, I consider, compelled by the opening words of the subclause, ie:

> *"The University must not terminate the employment of an academic unless the academic has been given notice and/or compensation as required by Clause 14 of this Agreement ...."*

The remaining portion of the subclause qualifies the operation of the broad prohibition contained in the opening words; it does not alter the subclause's subject matter.

33 The above conclusion is reinforced, in my view, by the use of the phrase *"an academic **found** to have engaged in conduct of a kind ..."* in subcl 59.2 (emphasis added). The concept of a "finding" as to conduct is, I consider, suggestive of a procedure leading to a determination as to that conduct. Clause 61 of the Agreement provides for such a procedure. On the argument advanced by the respondent, an academic staff member could be *"found to have engaged in conduct of a kind envisaged in Section 170CM(1)(c) of the* [Act] ..." within the meaning of subclause 59.2 merely because the Vice-Chancellor had formed the view that he or she had engaged in conduct of that kind. Having regard to the procedure required by cl 61 of the Agreement to be followed before "findings" may be made as to conduct which could constitute mere misconduct, as opposed to serious misconduct (see subcl 61.10.2), the interpretation of the above phrase for which the respondent contends seems to me to give inadequate weight to the context in which the phrase is found.

34 The references made within cl 61 of the Agreement to conduct of the kind envisaged in par 170CM(1)(c) of the Act are also of significance. The first of these references is found in subcl 61.3, which authorises the Vice-Chancellor to suspend a staff member, on full pay or alternatively without pay, if the Vice-Chancellor is of the view that the alleged conduct of the staff member is conduct of the kind envisaged in par 170CM(1)(c) of the Act. The second of these references is found in subcl 6.10.2 which authorises the University to terminate without notice the employment of an academic found to have engaged in conduct of a kind envisaged in par 170CM(1)(c) of the Act. Each of these references reflects an intention that cl 61 of the Agreement provide a procedure which is capable of being followed in respect of misconduct of the kind envisaged in par 170CM(1)(c) of the Act. It would, in my view, render the Agreement unworkable in a practical sense if the references were required to be read and understood, as the submissions of the respondent would require them to be read and understood, as references to a subclass only of misconduct of the kind envisaged by par 170CM(1)(c) of the Act (ie misconduct of the kind envisaged by par 170CM(1)(c) of the Act which is also "serious misconduct" within the meaning of cl 61 of the Agreement).

35 It is, in my view, of some significance to note that subcl 61.3 of the Agreement authorises the Vice-Chancellor to suspend a staff member without pay if the Vice-Chancellor is of the view that the alleged conduct of the staff member amounts to conduct of the kind envisaged by par 170CM(1)(c) of the Act, and subcl 61.7 allows a suspended staff member to be effectively excluded from the University. Having regard to these provisions, there would seem to be limited room for the University to be embarrassed by an interpretation of the Agreement which requires compliance with the procedures provided by cl 61 in the case of a staff member believed to have engaged in conduct of the kind envisaged by par 170CM(1)(c) of the Act.

36 All parties submitted that it was unnecessary to go outside the terms of the Agreement, or to rely on extrinsic materials, for the purpose of determining the meaning of the relevant provisions of the Agreement. I agree with these submissions. It is therefore unnecessary for me to give consideration to the circumstances in which extrinsic materials may be referred to for the purpose of construing a certified agreement, or to the nature of the extrinsic materials to which, in an appropriate case, reference may be made. I note, however, that none of the extrinsic material which was placed before the Court would, had I considered it to be relevant, have been regarded by me as supportive of the submissions advanced by the respondent.

37 I conclude that subcl 59.2 of the Agreement does not authorise the termination of the employment of an employee whose employment is subject to the Agreement without the Vice-Chancellor taking the steps in cl 61 of the Agreement. In my view, subcl 59.2 is concerned solely with the issue of the provision of notice or compensation in lieu of notice. I further conclude that cl 61 of the Agreement does prescribe steps that are to be taken before the Vice-Chancellor takes disciplinary action against an academic staff member for reasons of unsatisfactory conduct, whether amounting to misconduct or serious misconduct within the meaning of the Agreement, including for reasons of misconduct of the kind envisaged by par 170CM(1)(c) of the Act.

38 The interpretation sought by the applicants is " [a]*n interpretation of the proper meaning and effect of Part 7 of the Agreement and in particular cl 61 of the Agreement*" . No attempt was made to justify the claim for such an extensive interpretation. Having regard to the dispute between the parties it will, in my view, be sufficient for an order to be made that upon the true meaning and intent of cl 61 of the Agreement, cl 61 prescribes the steps that are to be taken before the Vice-Chancellor takes disciplinary action against an academic staff member for reasons of unsatisfactory conduct, whether amounting to "misconduct" or "serious misconduct" within the meaning of the Agreement, including for reasons of misconduct of the kind envisaged by par 170CM(1)(c) of the Act.

39 I have concluded that it would not be appropriate to formulate additional orders without hearing further from counsel. First, I consider that I would be assisted by submissions (in the case of the respondent, by further submissions) on issues touching upon the appropriateness of the other claims for relief made by the application. These issues include, but may not be limited to:

(a) the legal effect, if any, in the events that have happened of the purported termination on 26 February 2001 of Dr Steele's employment;

(b) the relevance, if any, in the circumstances of this case, of the general principle that the courts will not grant specific performance of contracts of service; and

(c) whether, if the respondent's conduct in purporting to terminate the employment of Dr Steele was of *"no force or effect"* as asserted by the applicants, such conduct was capable of constituting a breach of the Agreement.

40 Secondly, it may be that the parties will be able to reach agreement as to the amounts, if any, of the payments to which Dr Steele is entitled in the light of the interpretation of the Agreement. However, if the parties are not able to reach such an agreement, it will be necessary for the Court to receive further assistance as to the calculation of any amounts which are found to be payable. I hold the tentative view (although further submissions may persuade me to the contrary view) that it would not be appropriate for the Court to order that the respondent make a payment to Dr Steele without the amount of that payment either being specified by the order or the precise method by which it is to be calculated or identified being made clear by the order.

41 Each of the parties will be given liberty to apply on five days' notice to the other parties to have the proceeding relisted.

I certify that the preceding thirty-four (34) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Branson.

Associate:

Dated: 7 August 2001

Counsel for the Applicant:	Mr JW Shaw QC with Mr P Ginters
Solicitor for the Applicant:	Maurice Blackburn Cashman
Counsel for the Respondent:	Ms C Ronalds
Solicitor for the Respondent:	Hansons
Date of Hearing:	5 July 2001
Date of Judgment:	8 August 2001