IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2022] NZERA 606
3144603

	BETWEEN	BRUCE JANES Applicant
	AND	FIRE AND EMERGENCY NEW ZEALAND Respondent
Member of Authority:	David G Beck	
Representatives:	Ashleigh Fechney, advocate for the Applicant Shaun Brookes and Hannah Meikle, counsel for the Respondent	
Investigation Meeting:	22 and 23 September 2022 in Christchurch	
Submissions/Information Received:	12 October 2022 from the Applicant 12 October 2022 and 10 November 2022 from the Respondent	
Date of Determination:	18 November 2022	

DETERMINATION OF THE AUTHORITY

The employment relationship problem

[1] Bruce Janes is currently employed by Fire and Emergency New Zealand (FENZ) as a Senior Risk Advisor. Prior to this, Mr Janes was employed as a Principal Rural Fire Officer (PRFO) in North Canterbury. The PRFO job was disestablished as part of a FENZ restructure but Mr Janes remained employed until he accepted the Senior Risk Advisor role on 2 July 2021.

[2] Mr Janes does not contest the rationale behind the restructuring and his PRFO position being disestablished but claims FENZ unjustifiably disadvantaged him by not appointing him

to a newly established Group Manager role. Mr Janes' asserts his predominant concern as: "I did not have to be either 'best suited' or the 'preferred candidate' to be redeployed into the GM position. My skills, experience and qualifications are in fact relevant and transferable to the GM position".

[3] As remedies, Mr Janes seeks appointment as a Group Manager in Canterbury and to be awarded compensation for the distress and humiliation he says was caused by the prolonged process and decision to not appoint him. If the Authority declines to order this appointment, Mr Janes is claiming future lost earnings beyond 27 September 2023 when his current 'grandparenting' arrangement maintaining his salary at the level of his former PRFO role, expires.

[4] By contrast, FENZ contend that Mr Janes was not disadvantaged by the restructuring process. He was redeployed to a suitable role that maintained his ongoing employment and the decision not to appoint him to a Group Manager role, was the legitimate exercise of an employer discretion. FENZ assert their non-appointment decision is a fair and an accurate assessment of Mr Janes' capabilities and is not open to challenge. Further, should the Authority determine otherwise, FENZ oppose Mr Janes being appointed to a Group Manager role; claiming such would be impractical and unreasonable in all the circumstances.

The Authority's Investigation

[5] The investigation meeting took two days and I heard evidence from Bruce Janes and his wife Angela Janes and for FENZ (in this order): Amanda Hastrop, HR Consultant involved in the restructuring project; Mike Grant, Region Manager, Otago/Southland and interview panel member; Aaron Waterreus, FENZ Specialist Response Manager Tauranga and interview panel member; Sara Thornton, an external recruitment consultant and interview panel member for Group Manager and Community Risk Manager roles; Jeremy Wheeler, FENZ HR Manager, Upper South Island and Paul Henderson, FENZ Region Manager Upper South Island and interview moderation panel member and interview panel member for Community Risk Manager role.

[6] I received submissions from both parties' representatives following the investigation meeting. As permitted by s 174E the Employment Relations Act 2000 (the Act), I have not

set out a full record of every event or matter in dispute between the parties. This determination is confined to making findings of fact and law necessary to dispose of Mr Janes' claims and resolve the employment relationship problem.

Issues

[7] The issue the Authority must resolve is, was Mr Janes unjustifiably disadvantaged by any actions or omissions FENZ engaged in during the restructuring process, including questions of:

i. whether FENZ complied with the relevant provisions of Mr Janes' employment agreement and their own restructuring guidelines governing the process of disestablishing Mr Janes' PRFO position and subsequently redeploying him?

ii. were FENZ restructuring guidelines and how they were applied, consistent with the protections envisaged for impacted employees contained in section 30 of the Fire and Emergency New Zealand Act 2017?

iii. was Mr Janes treated in procedurally fair and reasonable manner when he applied for a vacant Group Manager position?

iv. did FENZ breach any good faith or other obligations owed in not redeploying Mr Janes to his preferred position of Group Manager and in subsequent communication with him, once he became dissatisfied with the decision to not appoint him to the Group Manager role? and:

v. if Mr Janes' is successful in establishing his unjustified disadvantage grievance, can he be appointed into a Group Manager role and if not, what other remedies are appropriate to resolve the employment relationship problems identified?

vi. should any remedy granted be reduced by reason of any actions of Mr Janes that contributed to the situation that gave rise to the personal grievance?

vii. how is the question of costs to be dealt with.

What caused the employment relationship problem?

[8] To understand the totality of Mr Janes' situation requires a reasonably detailed outline of events and background matters as follows.

[9] When engaged by FENZ as PRFO in August 2017, Mr Janes was responsible for 23 rural fire brigades and 407 volunteer firefighters in the North Canterbury region.

[10] With the passage of the Fire and Emergency New Zealand Act 2017 (FENZ Act) the Government amalgamated urban and rural fire agencies across New Zealand. The first phase involved devising a nationwide organisation made up of career and volunteer firefighters and support staff including those in leadership, operational, advisory and support roles. The restructure was lengthy and complex. It started impacting on Mr Janes from February 2019 with a proposed: "Service Delivery Leadership Team" organisational structure and ended on 27 September 2021, when this new structure became operational.

[11] On 4 February FENZ alerted Mr Janes to the commencement of formal consultation. It was suggested that: "If the proposal was to be adopted your position would have a change in its reporting line". The proposal title was set out in a document headed:

> A unified Fire and Emergency New Zealand: proud history, bright future
>
> Proposal for consultation on the Service Delivery Branch Leadership Team
>
> - for Fire and Emergency employees and volunteers.

[12] As the restructure progressed, it became clear Mr Janes' PRFO role would disappear and he would have to seek an alternative role in the new structure. This was confirmed by a letter of 18 September 2019, commencing the consultation period on a proposal to disestablish his PRFO role. It indicated, if he was not successful in getting a new role his "employment could terminate by reason of redundancy on notice".

[13] The proposal (that eventually transpired) was that PRFO roles would disappear and the nearest equivalent position in the new structure, was a Group Manager of which seven were created in Canterbury. Accompanying the proposal was a: "Proposed Employee Transition Protocol". This outlined the process to be adopted to move employees to a new structure. It noted FENZ would undertake an analysis a 'Position Impact Assessment" (PIA) of existing positions then contrast this with new role descriptions to assess differences. Once this was completed, the PIA was to be used to guide the impact on people in existing positions and how they would find a place in the new structure. The impacts were detailed in order and with qualifying explanations, as "affected" employees being either: reconfirmed, re-assigned

or redeployed. These categories and the degree of change required from existing roles, was carefully explained.

[14] Reconfirmation was described as a “new role that was the same or would require minimal change to the current position”. Whereas reassignment, was described as a requiring “more than minimal change to the current position" to “one that has duties and responsibilities that are similar to the current position” and “would not involve a change in duties that are unreasonable” taking a range of factors into account. These factors in summary were:

- Skills, qualifications, experience, and abilities.
- Potential for retraining.
- Location (reasonable commuting distance)
- The new position “would be different to the current position by no more than 20%”.

[15] Of significance, was a suggestion that if there was competition between affected employees in positions deemed suitable for reassignment, a “closed selection” process would occur and, if an employee was unsuccessful then redeployment was the next step. Redeployment was described as also being an imposed option, where “a position in the current organisational structure would be the subject of significant change” or no longer required (impliedly more than 20% change).

The transition to the new structure

[16] FENZ’s updated “Employee Transition Protocol” (ETP) was devised by consulting unions and associations representing employees and was provided to Mr Janes. The ETP was published in its purportedly “FINAL” form in January 2020. It is a lengthy document, not easily comprehensible and at points, expressed in tentative and sometimes jargonistic or opaque language. It was issued prior to the organisational structure being finalised. It says that “Step One” [1] (once “a proposed new organisational structure has been developed”) involved FENZ undertaking a PIA analysis. The PIA was then to be used to determine options available. The less than 20% change guidance to determine if re-assignment was feasible, was also referenced.

[1] FENZ Employee Transition Protocol, January 2020, FINAL, Pages 5-6.

[17] An ETP appendix explained terms used and noted that the PIA would take account of:

- structure (e.g., reporting relationships, span of control, relationships. delegations)
- skills, knowledge or capability
- process of work activities
- systems and enablers for the functions to be performed.

[18] I note the final ETP without explanation, altered and reduced the factors that would be considered on points of difference between positions. In the event, a PIA was undertaken on Mr Janes' role without his input and the result was not disclosed to him. It was not until Mr Janes made repeated Privacy Act and Official Information Act requests including raising a personal grievance that the PIA was disclosed on 11 November 2021.

Information disclosure and good faith finding

[19] I have viewed the totality of the correspondence between the parties on information disclosure issues and without traversing the extent of it, I make a finding that FENZ was obstructive in not providing timely information to justify a decision not to appoint Mr Janes to the Group Manager role. Mr Janes is in an ongoing employment relationship. Section 4(1A)(b) of the Act requires the "parties to an employment relationship to be active and constructive" and "responsive and communicative". This was transgressed by a lack of timely information provision and by a pedantic approach to Mr Janes' repeated information requests. A stark example was Mr Janes made a request for information on 25 March 2021 asking for relevant interview documentation and his assessment results and did not receive an interim response until 27 April. The response unnecessarily used the Privacy Act as a 'shield' to avoid providing information in a timely manner – this breached known good faith obligations.

[20] Section 4(1A)(c) of the Act, outlines a positive duty of disclosure of information including during a restructuring process where an employer is contemplating a decision that "will, or is likely to, have an adverse effect" on an employee. Timely disclosure is to allow an "opportunity to comment on the information to their employer before the decision is made". It is not a game of 'cat and mouse' where the employee makes specific requests and the employer responds at their own pace – the onus is on the employer to provide information.

In an analogous Employment Court case (*Jinkinson v Oceana Gold (NZ) Ltd (No2)*) where an employee was denied a redeployment opportunity due to application of a selection process, Judge Couch noted that:

> Subsection (1A)(c) is particularly significant in cases involving restructuring such as this. It emphasises the need for full and open communication by the employer and the provision of a properly informed opportunity for the employee to participate in the process. Addressing this provision, Ms Brook invited me to draw a distinction between cases in which employees are being selected for redundancy in a downsizing process and cases in which employees were being selected for redeployment to alternative positions …..
>
> I do not accept that submission. ….. In carrying out the selection process, therefore, Oceania Gold was undoubtedly proposing to make a decision that would, or was likely to, have an adverse effect on the continued employment of one or more of its employees. Those who were selected would have their employment continued. The employment of those not selected would be terminated. Section s 4(1A)(c) therefore applied to that selection process. [2]

[21] In giving evidence FENZ discussed the PIA assessments, claiming they had sufficiently disclosed them to the firefighters' union and relevant staff associations. I find this was limited consultation and breached obligations owed to Mr Janes.

[22] Mr Janes conceded in giving evidence that, as his PRFO role was significantly different to the Group Manager role it was appropriate it be disestablished rather than him being reconfirmed or re-assigned. He accepted the Group Manager role had less responsibilities. However, Mr Janes written brief, asserted that the General Manager role had enough similarities to the PRFO role and claimed he should have been redeployed rather than be subjected to a rigorous suitability assessment.

[23] The first ETP says to be re-assigned "a position would be different to the current position by no more than 20%". I am not convinced this threshold was comprehensively deployed for Mr Janes' comparison of roles, despite FENZ's counsel suggesting the PIA found "significant change" was involved. I make this finding on the basis Mr Janes had no input into the PIA so was not consulted on the range and scope of duties and responsibilities he undertook as a PFRO in contrast with the new roles. This was a breach of good faith and in breach of Mr Janes' individual employment agreement's consultation provision.

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[2] *Jinkinson v Oceania Gold (NZ) Ltd (No2)* [2010] NZEMPC 102 at [52].

[24] FENZ concluded the duties and responsibilities of the PRFO role were significantly different to those required in the new structure but they did not, at the time, provide Mr Janes with the basis of how this decision was made. This was a significant failing. The scope of the responsibilities in the Group Manager role were less than the PRFO role and the salary band was slightly lower (PRFO band 18 – Group Manager band 17.5). However, the Group Manager role was the nearest equivalent position to the PRFO role in the new structure.

[25] From evidence provided, FENZ conceded that the PIA analysis was confined to a comparison of written job descriptions and undertaken by an external HR consultant. Operationally, it is arguable that the positions were similar. One of the significant responsibilities the PRFO role shed was financial. I do accept FENZ made out that the Group Manager role was different in scope to the PRFO role. This is not a decisive issue though, as my analysis of wider obligations owed, is more determinative.

Redeployment conditions

[26] The ETP describes redeployment being triggered when a position was disestablished. First, the individual was conferred "affected status" after their position was disestablished. This led to being "considered for Redeployment to a new or vacant position in the organisational structure". "Redeployment options" are then described as including appointment into a position that:

- Could be different from the employee's previous position, skills and experience, even with retraining
- Could be in a different location which is not within a reasonable commuting distance
- Could pay a salary that is less then the employee's existing salary
- Could have a change in terms and conditions of employment. [3]

[27] After stating a person must be assessed "suitable for the position" - being suitable is described as:

> …. demonstrating that they have the skills, knowledge, experience and abilities, as detailed in the position description, to undertake the new position, and any upskilling on new and unfamiliar aspects could be achieved within a relatively short period of time.

[3] At [8].

[28] The ETP then states:

> Once an affected employee is assessed as being suitable for a position they have applied for, they would be provided with a provisional offer of employment for their consideration.

[29] The protocol then details how redeployment appointments to "new and vacant" positions were to be made and described this as: "An objective process" that would be the subject of consultation but "would include consideration of the following:

> - How would any new and vacant positions be advertised and who would be eligible to apply – externally, internally to all personnel or internally to a specified group of employees internally
> - The application process, e.g., submission of Curriculum Vitae, or application forms or an Expression of Interest Form
> - Details of any selection process including criteria for suitability.

[30] The ETP indicated more clarity would be forthcoming. It noted a need to be clear on who was eligible to apply for new and vacant positions. It stated this "could include restricting applications in the first instance to affected employees from a specific group before advertising positions internally or externally". Despite confusingly alluding to 'external' applicants, it then indicated those who meet "the suitability requirements will always be appointed before applicants who are best suited".

Communication of disestablishment of PRFO role

[31] The pace of the restructuring was slow. However, I acknowledge that Covid restrictions existed during this period and litigation on FENZ Act matters was an added distraction.

[32] It was not until an 11 June 2020 letter, that Mr Janes was advised his PFRO was disestablished – a decision that was described as likely coming into effect "towards the end of this calendar year". Mr Janes was told he was an "affected" employee and would enter a process described in the ETP. The letter stated it, "comprises notice of your redundancy, as per section 30 of the Fire and Emergency New Zealand Act 2017" and described how FENZ would be discussing redeployment options in the coming weeks. I note s 30 of the FENZ Act was not explained and no mention was made of the PIA process and its impact.

[33] The 11 June letter said new positions would be advertised and Mr Janes would receive a redeployment preference form. Somewhat confusingly, despite referring to the ETP, the letter enclosed a 69 page: "Decisions Service Delivery Branch June 2020" document noting this contained advice on "some areas we would like to consult with you and get further feedback on". The further consultation was described as commencing on 15 June and ending on 13 July. The areas they were "reconsulting" on were:

> 1. The way we will assess whether applicants for the District and Group Manager positions have the level of incident management experience required of the roles
>
> 2. The selection criteria and processes for decision-making for redeployment of affected employees to the new district positions
>
> 3. Proposed reduction in the number of some new positions available for redeployment to ensure the structure can be funded within existing allocations and is efficient.

[34] A further: "Reconsultation Document" with more detail was said to be available by the end of June 2020. In the interim, Mr Janes submitted a redeployment preference form. He ranked his positions in preference order as:

- Group Manager
- Community Risk Manager
- Senior Advisor (Risk Reduction).

Reconsultation

[35] A 40-page document: "Additional and changed proposals for reconsultation" issued in mid-June 2020 then indicated further delay in implementing changes and consultation was extended to 13 July. A decision-making timeframe from August 2020 was suggested to start recruitment to fill new positions. It presented an expanded list of matters to be 'reconsulted', expressing them in a slightly different fashion and order to para 32 above.

[36] In the event, it was mid-March 2021 when Mr Janes' unsuccessful application for the Group Manager role was communicated to him.

[37] Of significance, was a proposal to change the assessment of competencies for prospective Group Managers to now include some experience in managing complex incidents.

It described that core competencies including experience of “practical incident leadership”, would be measured utilising a detailed questionnaire (CORE) with follow up reference checks and an independent verification process. Applicants were to demonstrate “at least 60% of the available points in every competency area” to proceed to the short-listing process.

[38] Mr Janes completed his CORE assessment in August 2020 which qualified him for an interview for his first preference of Group Manager. Mr Janes’ CORE assessment score was 100%.

[39] I observe the CORE assessment is a reasonably comprehensive and objective approach to deeming suitability for redeployment and arguably consistent with Mr Janes’ individual employment agreement. However, the selection proposal then swung beyond an objective approach, by indicating the next stage would be an interview conducted by a panel “of Senior Managers, including the Region Managers and a Human Resources (HR) person”. This would involve applicants being assessed “via a presentation, interview and possibly some other assessments, such as a written exercise. Reference checks may be undertaken”. The proposal outlined the Group Manager selection-criteria as involving eight factors:

- Organisational leadership
- Team leadership
- Personal leadership
- Technical knowledge
- Stakeholder engagement and relationship management
- Analysis and judgment
- Results orientated
- Communication.

[40] The proposal outlined how the above factors would be percentage weighted and how the interview panel would use a 1-5 rating scale to assess each factor. Of note, was an additional suggestion that where the candidate was the “only affected staff member who has applied” then they would be deemed suitable only if they had a rating score of: “3 or more in all capability areas”. Proposed job descriptions for new roles including the Group Manager, were attached to the reconsultation document.

End of consultation phase

[41] By a 24 August 2020 document (47 pages), headed: "Service Delivery branch structure and approach to rank: Decisions on additional and changed proposals", FENZ announced decisions on the five outstanding reconsultation matters. The final decisions left the proposals in the reconsultation document largely unchanged as they related to the scoring to be used and critical capability factors, although "personal leadership" was dropped – presumably because organisational and team leadership sufficed. This left seven capabilities to be scored 1-5 and the weightings remained the same as originally proposed – that is a score of up to 2 got an applicant an interview.

[42] The bar for eventual appointment was a rating of: "3 or more capability areas". In application, the rating scale was a four-point scale as the definition of "0" was incongruously: "No evidence of the experience and abilities required". The Interview Panel all said they marked Mr Janes using a four-point scale.

The interview panel's approach and information provided

[43] The agreed process was the interview panel first assessed candidates' CV and then scored this against the capability factors; with above 2 in each category being shortlisted for an interview. The panel scored Mr Janes five 3's and two 4s, deeming him suitable to be interviewed for the Group Manager role.

[44] Mr Janes says after he completed his CORE assessment in August 2020, it was not until late January 2021 that he was told he had been shortlisted for an interview for the Group Manager and Community Risk Manager roles. Mr Janes was interviewed for the latter role on 11 February 2021.

[45] Of the interview panel for the Group Manager position, there were three people that Mr Janes had no operational relationship with – Mike Grant, Region Manager, Otago/Southland; Aaron Waterreus, FENZ Specialist Response Manager based in Tauranga and Sara Thornton, an external executive recruitment consultant who had been advising FENZ.

[46] Prior to interviews, panel members were provided an information pack containing a comprehensive job description (including an outline of the person specifications and "key capabilities for recruitment"); a guidance sheet specific to the Group Manager role to aid and interpret and apply selection scoring; the assessment form for use during the interview; the applicant's CV and application cover letters.

[47] Mr Janes accepted he was fully briefed on the interview format and that he had to prepare a presentation followed by behavioural focused questioning. Despite FENZ indicating the panels were chosen from people not having any relationship with the applicants, Mr Henderson sat on the Community Risk Manager interview panel that interviewed Mr Janes despite Mr Janes reporting to him in his PRFO role.

[48] FENZ's evidence was that all interviewed affected employees had their interview outcomes subjected to what they described as an independent moderation process. This involved a panel of ten senior leaders (SDLT) and members of the restructuring project team including Mr Henderson. Ms Hastrop described the moderation panel as having to ask a question "does the interview score reflect reality?" and, that:

> All members of the SDLT, would then have an opportunity to discuss the applicant's scores and explain if in their view, the applicant's score in a capability did not reflect reality and ought to be considered further and potentially changed. Any submission had to be backed by specific evidence and examples – rather than a general description or feeling about the applicant or their experience, or current position they hold.

[49] Ms Hastrop says the Group Manager recruitment process "was rigorous" involving applicant's having to pass:

(a) CORE (involving 2 referees whose opinions were challenged by independent verifiers)

(b) a shortlisting process which involved a panel of 3 people whose opinions were then moderated by a 10-person panel; then

(c) an interview process which involved a panel of 3 people whose opinions were independently verified by a 10-person panel.

[50] Ms Hastrop could not recall there being much discussion about Mr Janes during the moderation process but Mr Henderson suggested otherwise. Mr Henderson claimed the panel

in assessing Mr Janes, was "particularly concerned about the very low score for leadership, stakeholder engagement team leadership, and communication" and the "results reflected reality in our experience of Mr Janes". Mr Henderson says he formed a negative view of Mr Janes on interactions he had had after he communicated to him that his application for the Group Manager role was unsuccessful (which was after the moderation process); a prior decision to remove a rural brigade from his oversight and being aware that HR had counselled Mr Janes over the tone of some of his emails. However, when questioned Mr Henderson conceded he had had no operational concerns around Mr Janes. I found his criticism of Mr Janes was generalised and somewhat subjective.

[51] Mr Henderson carried out no performance assessments on Mr Janes in the time he managed him and had no cause to formally discipline or performance manage him. Mr Janes indicated he previously had limited interactions with Mr Henderson (recalling two visits to his workplace and Mr Henderson not seeing him 'in action') and he claimed that the email concerns were selective.

[52] Mr Henderson's evidence was that apart from the issues he highlighted, Mr Janes performed "adequately as a PRFO" but he held a view this did not equate to him being suitable for a Group Manager role. Mr Henderson however, confirmed that if the Authority did place Mr Janes in a Group Manager role, he would have no problem personally interacting with him despite his negative view of his suitability for the role.

[53] I observe, a key failing of the selection process was Mr Janes not being allowed to provide any feedback on his interview scoring nor was he apprised of the moderation panel concerns. Ms Hastrop unconvincingly asserted allowing such feedback "would not have been practicable given the size and scope of the restructuring process".

Aftermath

[54] On 17 March 2021, Mr Henderson advised Mr Janes that his applications for the Group Manager and Community Risk Manager roles were unsuccessful. Mr Janes recalled during this telephone conversation, that Mr Henderson assured him he would be offered a Senior Risk Advisor role that Mr Janes thought would not involve an interview. However, a follow up email from Mr Henderson said Mr Janes retained his "affected status" and FENZ

would continue working through redeployment options and, inquired if Mr Janes still had "preference for any other suitable roles FENZ advertises that you want to apply for".

[55] Mr Henderson says a subsequent meeting of 25 March, with Mr Janes and Mrs Janes, that Mr Wheeler also attended, was tense because he explained the interview and the scores given by the panel and some retrospective examples of where he considered Mr Janes had fallen short in his PRFO role. Mr Janes says he asked for the interview documentation at this meeting but Mr Wheeler declined to provide it. Mr Janes followed this request up by email on the same day citing the Privacy Act. The request was acknowledged on 29 March but no documentation was disclosed.

Mr Janes' personal grievance letter

[56] By letter of 7 April 2021, Mr Janes raised a personal grievance (PG). It alleged an unjustified disadvantage, asserting the decision to not appoint him to either of the Community Risk Manager or Group Manager positions was "not fair or reasonable in all the circumstances" and in breach of good faith obligations. It described FENZ as not being "active and constructive in maintaining the employment relationship".

[57] The PG letter also cited cl 10(a) of Mr Janes' employment agreement: "Fire and Emergency New Zealand shall endeavour to find you an alternative position within Fire and Emergency New Zealand, appropriate to your skills and experience". It suggested "find" did not mean Mr Janes "would be required to undergo an extensive application process for redeployment". It also suggested in the alternative, that Mr Janes' comparison of his PRFO role versus the new Group Manager role, was that "sufficient similarity" which should have entailed automatic redeployment without any selection process.

[58] I observe that re-assignment was the more correct claim but the expressed sentiment was the same. Mr Janes' advocate, then noted an understanding that "only six or seven locally affected candidates" had applied for six vacant roles and one person had been offered a Group Manager role even though, that person currently reported to Mr Janes in his PRFO role. As a remedy Mr Janes sought potential lost wages, compensation for hurt and humiliation, and legal costs. Mr Janes' advocate informed FENZ she had made a pre-emptive

request for mediation and was looking forward to FENZ providing the information Mr Janes had requested under the Privacy Act.

[59] FENZ responded to Mr Janes' Privacy Act request on 27 April, stating they had up to 20 days to respond but were notifying him that they had opted to extend this timeframe under section 48 of the Privacy Act to 25 May 2021. I find this was an unnecessarily obstructive approach given that a timely response was required.

[60] FENZ upon request for clarity during the investigation process, disclosed that six Canterbury affected applicants and two from outside Canterbury applied and were interviewed for six Group Manager roles. At the time Mr Janes applied (February 2021), four were appointed in late March – mid April 2021 and two were appointed in July 2021. Of the later appointees one had "unaffected" status. FENZ indicated all six have been permanently appointed and are currently still occupying those roles (with one on secondment).

FENZ initial response to the PG

[61] By letter of 7 May over Mr Henderson's signature, FENZ responded to the PG letter. In summary, FENZ's alternative perspective was they had at all times acted in good faith. Mr Henderson initially traversed the restructuring process and rationale for it. This included asserting that "the duties and responsibilities of the (PRFO) were significantly different to those required in the new structure". He then described how duties/responsibilities of the PRFO were redistributed in the new structure amongst other new management roles.

[62] The Group Manager role was described as confined to "day to day management and leadership of brigades and other District team members". Mr Henderson then asserted "these are new roles – they are not roles that are being addressed via reconfirmation, nor to use your letter, automatic redeployment". I observe Mr Henderson also used incorrect terminology in referring to "reconfirmation" where it should have been obvious Mr Janes was arguing he should have been re-assigned. FENZ's later (15 October 2021) response to various questions Mr Janes had posed, also included that two Group Manager positions were still the subject of the "recruitment process" (no location was disclosed).

[63] Mr Henderson's 7 May letter also suggested that s 30 of the FENZ Act allowed FENZ "to appoint an affected employee other than PRFO Janes' to a new role whether the person was best suited or not" then said Mr Janes had not been deemed suitable anyway. I view this interpretation as somewhat superficial and unhelpful. Mr Henderson also did not address Mr Janes' concern that one of his subordinates had been appointed to a vacant Group Manager role or detail the reasons why Mr Janes had been deemed unsuitable. It would have assisted if FENZ had disclosed the PIA analysis in a timely manner to justify their decision to not re-assign Mr Janes. It was not disclosed until 11 November 2021.

[64] I find whilst suggesting FENZ had no obligation to 'require" them to find Mr Janes a new role, Mr Henderson failed to acknowledge established employment case law. This suggests an employer has an obligation to redeploy an employee into a comparable role [4] or at least to have to justify not doing so in terms of s 103A of the Act and good faith obligations. As Judge Couch noted in *Jinkinson*, the Authority can objectively review an employer's actions up to an including when a decision is made to appoint or not appoint someone affected in a redundancy situation into a comparable role. [5]

[65] Mr Henderson's view was that FENZ's decision to decline appointment of Mr Janes to the Group Manager (and Community Risk Manager) role was procedurally and substantively justified. Notwithstanding, Mr Henderson indicated FENZ was willing to attend mediation. He then suggested redeployment options could still be explored to three lower graded advisory roles; provided Mr Janes met the "suitability criteria". Mr Henderson concluded his letter by indicating a team in FENZ was working on meeting their 25 May deadline for responding to Mr Janes' request for information.

[66] I do acknowledge that FENZ subsequently redeployed Mr Janes, maintaining the ongoing employment relationship and that this is a significant factor I must consider.

[67] By an email of 14 May, Mr Janes' advocate thanked FENZ for agreeing to attend mediation and stated Mr Janes was seeking "redeployment to one of the remaining Group Manager roles" and, that if this was not achieved in mediation, he was contemplating an "interim reinstatement" application to the Authority. Mr Janes' advocate then suggested to

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[4] *Wang v Hamilton Multicultural Services Trust* [2010] NZEmpC 142, (2011) 8 NZELR 588.
[5] *Jinkinson v Oceana Gold (NZ) Ltd, above n 4.*

FENZ that it would be prudent to not appoint to the final vacant Group Manager role in case the Authority was minded to subsequently appoint Mr Janes in this role. I note this expanded upon the remedies Mr Janes had initially sought in his personal grievance letter.

[68] The parties attended an unsuccessful mediation on 17 June 2021. Mr Janes filed an application to have the matter dealt with by the Authority on 29 June 2021. One of the remedies sought is detailed as: "Reinstatement or placement in a position no less advantageous to the employee (being the Group Manager position), in accordance with section 123(1)(a) of the Employment Relations Act 2000".

Redeployment

[69] In the interim, Mr Janes was told he was ineligible and unsuitable to re-apply for unfilled Group Manager roles because of his low interview scores. After a prolonged process, that was initially going to be contestable, Mr Janes was redeployed into a Senior Risk Advisor role. This appointment was after a telephone call from Mr Henderson on 1 July, inquiring whether Mr Janes was still interested in the role and upon affirming he was, an offer was made on 2 July to commence on 27 September 2021.

[70] Mr Janes says he enjoys the new role but it came at a significant salary reduction ($143,136 to $109,395). This is partially ameliorated by a grandparenting provision protecting his existing PRFO salary for two years. Mr Janes says that a month after he had accepted the advisory role, he was told he would be expected to work out of the Rolleston FENZ office (and not Rangiora) - a 124 kms' daily commute (a matter still in dispute but not raised for resolution in these proceedings).

The legal framework

The employment agreement

[71] Mr Janes was employed pursuant to an individual employment agreement (IEA) and paid a salary of $143,163 per annum. Mr Janes' then IEA at clause 5, under "POLICIES AND PROCEDURES" has a provision that such would "not constitute terms and conditions of employment unless expressly noted" but it also says all policies and procedures that FENZ

had in place would be considered "lawful instructions" and any new policies developed by FENZ "will be binding on you".

[72] Under a clause 10 "RESTRUCTURING" heading, the provisions relevant to this investigation say:

> Fire and Emergency New Zealand may restructure or change the organisational structure or positions within that structure. When such restructuring change directly affects you, you will be consulted and have the opportunity to make submissions before proposed changes are finalised.
>
> If, following such consultation your position is disestablished as a result of restructuring the following shall apply:
>
> (a) Fire and Emergency New Zealand shall endeavour to find you an alternative position within Fire and Emergency New Zealand, appropriate to your skills and experience.
>
> (b) If Fire and Emergency New Zealand is not able to offer you an alternative position within Fire and Emergency New Zealand appropriate to your skills and experience, and your employment is terminated on the grounds of redundancy you will receive:
>
> **Note**: a notice and redundancy pay formulae is then inserted with a provision that no entitlement to such exists if an alternative position "on substantively the same terms and conditions of employment" is offered.

Fire and Emergency New Zealand Act 2017 (FENZ Act)

[73] Section 30 of the FENZ Act specifically adresses a redundancy situation. It provides that the normal appointment on merit and review procedures contained in sections 26-29 of the FENZ Act do not prevail for appointments made when an employee who has received a notice of redundancy is applying for any alternative vacant position to avoid termination of employment.

[74] The Court of Appeal[6] in endorsing an earlier Employment Court decision rejecting an application for leave to appeal by the New Zealand Professional Firefighters Union, [7] indicated that s 30 of the FENZ Act, identifies an employer's common law obligations to explore re-assignment or redeployment options for those affected by a redundancy and, it

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[6] *New Zealand Professional Firefighters Union Incorporated v Fire and Emergency New Zealand* [2021] NZCA 60, CA720/2020 at [26].
[7] *New Zealand Professional Fire Fighters Union v Fire and Emergency New Zealand* [2020] NZEmpC 197.

effectively 'ring fences' (confines) suitable alternative appointment opportunities, to impacted employees.

[75] FENZ's own understanding of s 30 of the FENZ Act and the "benefits Parliament intended to confer on affected employees in terms of redundancy" was advanced by their counsel during the earlier Employment Court hearing where the Professional Firefighters Union unsuccessfully sought to set aside the application of s 30 in favour of a more rigorous appointment on merit process. FENZ's counsel asserted, and Chief Judge Inglis agreed with counsel, that s 30 clearly provided special consideration to affected employees, in that they would:

- not have to be best suited for the position in order to be redeployed;
- not have to compete for a new role with all comers who may apply;
- not have to go through the stress and anxiety of a contestable process in order to retain employment; and
- not have to go through the stress and anxiety of a review process, especially when such process could result in the appointment being withdrawn; not having to face applying for less and less relevant jobs. [8]

[76] Mr Janes' IEA provision, whilst being scant on process detail, is consistent with well-established case law that an employer has a good faith obligation to positively explore redeployment options in a redundancy situation. [9] The ETP process was extensively consulted on and I find FENZ is bound by it including the ETP being expressly incorporated into Mr Janes' IEA.

[77] I must assess whether FENZ acted in accord with s 30 of the FENZ Act. This raises a question of whether FENZ is entitled to then impose what was objectively a rigorous selection process. I have then to consider whether that process (albeit that it was extensively consulted over) was flexible enough to acknowledge that an appointment could be made where in the opinion of FENZ, the person was not "best suited" for the role.

[78] I do note, Chief Judge Inglis envisaged circumstances where 'automatic' redeployment is not always an outcome. The Chief Judge described where the person seeking

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[8] At [19].

[9] *Jinkinson v Oceania Gold (NZ) Ltd (No2)* [2010] NZEMPC 102 and *Wang v Hamilton Multicultural Services Trust* (2011) 8 NZELR 588 (EmpC).

a new role may be "substantially out of their depth" or unqualified and opined in that case: "Redundancy may be the outcome where redeployment is inappropriate". [10]

[79] I can find no reasonable basis to conclude Mr Janes was either assessed or considered 'out of his depth' should he be appointed to the Group Manager role. On the contrary, Mr Janes' CV, experience and the scope and complexity of his former PRFO role, objectively demonstrated this not to be the case.

[80] What occurred, as the evidence revealed, was for the Group Manager role, an interview panel of three was unimpressed by the answers and approach Mr Janes adopted during a behaviour-based interview. This was typified in a comment one interview panel member made, that Mr Janes' leadership examples he expounded on at interview "would not have made a difference overall given our concerns about the language and comments he used at the interview". [11] This comment and others made by witnesses that I do not traverse fully as they had a common theme, was indicative of an approach of the panel members holding subjectively negative views on some answers Mr Janes gave during the interview but failing to test those perceptions with any follow up questions (or reference checking).

[81] The impression I have formed, was Mr Janes was treated like an external applicant for the position rather than being regarded as a person facing a career halting, imposed restructuring. I make this observation without casting any aspersions on the interview panel members' professionalism – I just consider the whole approach failed to take account of the wider contextual circumstances and legal rights Mr Janes possessed as an impacted employee seeking to be redeployed into an objectively similar role.

[82] Whilst the interview scoring was moderated, I find that Mr Janes was afforded no input into this and was unable to respond to the moderation panel's opinion of him that was in part negative, due to previous interactions he had had with one of the moderation panel members.

[83] On the documentation and evidence given by witnesses, I also find that FENZ did not comply with their own expressed understanding of s 30 of the FENZ Act and they instead

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[10] *New Zealand Professional Fire Fighters Union v Fire and Emergency New Zealand* above n 7, at [24].
[11] Brief of evidence of Mike Grand, at [38].

constructed an overly rigorous process that was evidently designed to determine an employee best suited for the role, rather than merely being suitable for appointment. FENZ tried to persuade that Mr Janes was "unsuitable" for the Group Manager role but I remain unconvinced that this was a fair analysis. It appeared to be solely based upon a subjective interview.

[84] I do accept that a selection process is required where more employees than vacancies are at issue but I saw no evidence of any comparative approach being adopted to assess competing candidates and here, Mr Janes had no competitor. Rather, the focus of the selection panel, was to effectively set a subjective bar to appointment. This was reinforced by the decision to prevent Mr Janes from applying for a second round of applications for the Group Manager role.

Justification

[85] To justify any actions taken when disestablishing an employee's position in a redundancy situation and engaging in a redeployment selection process, FENZ must meet statutory requirements set out in s 103A of the Act commonly referred to as the 'justification test'. [12]

[86] The justification test is normally applied and arguably drafted as guidelines on procedural fairness where dismissal is at issue. However, s 103A(1) also applies to whether "an action was justifiable". It also covers situations where an ending of employment did not result and is equally a 'yardstick' to consider disadvantage claims advanced under s 103(1)(b) of the Act.

[87] In addition, whilst s 103(A)(3) of the Act factors, largely focus on disciplinary situations, s 103(A)(4) states the Authority "may consider any other factors it thinks appropriate". Here the Authority is being asked to objectively assess the reasonableness of the actions FENZ undertook in not appointing Mr Janes to a position (Group Manager) that was the nearest comparable one to that which he formerly occupied.

[88] In applying the justification test, I start from a premise that FENZ is a well-resourced organisation with ample access to specialist legal and human resource advice. I must therefore

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[12] *Jinkinson v Oceania Gold (NZ) Ltd above* n 4.

hold them to a reasonably high standard or at least, not consider lack of resources as a mitigating factor.

[89] Applying s 103A(3)(a) of the Act, obliges the Authority to consider if FENZ sufficiently investigated whether Mr Janes was capable of being deemed suitable for redeployment into the Group Manager role.

[90] The first factor I assess is, was the PIA exercise contrasting the PRFO role with the Group Manager role robust enough to rule out re-assignment. I heard evidence this was undertaken by an external consultant and conducted by a comparison of written job descriptions. Whilst I was provided with a retrospective view by FENZ witnesses it was clear that this had been undertaken without sufficient regard to the existing PRFO role.

[91] I find the PIA was too limited an approach. It should have involved wider exploration of what the contrasting roles involved, including scope and complexity, in addition to the job descriptions. This could only have been achieved by interviewing Mr Janes and/or his immediate managers or subordinates. The PIA was a vitally important task that appears to have been undertaken on a cursory basis. The categorisation that the jobs were more than 20% different (by FENZ's own approach) led to the role being open to prospective and actual appointees who had lesser responsibilities than Mr Janes.

[92] I then turn to whether FENZ sufficiently investigated Mr Janes' capabilities for being deemed suitable (by their imposed standard) for redeployment to the Group Manager role. Whilst FENZ's ETP was ostensibly robust, I find they did not conduct a sufficient investigation of any reference sources or seek comment on Mr Janes performance of his PRFO duties, beyond an interview that ruled him ineligible for appointment. Then, at moderation time, the evidence disclosed FENZ relied heavily on input from a manager who had limited dealings with Mr Janes.

[93] Whilst assessing internal applicants is fraught at the best of times, this was a context were Mr Janes supposedly held preferential status yet he was judged by a panel containing two FENZ employees who did not know him and an external recruitment consultant. I have found that the actual interview led to a perspective of Mr Janes that was imbalanced. Mr Janes' extensive CV, wide background and qualifications appear to have been discounted.

[94] The next factor is whether FENZ raised any concerns they held with Mr Janes before deciding he was unsuitable for appointment to the General Manager role. The evidence is concerns about his suitability were in the minds of both the interview panel and moderation panel but not put to Mr Janes for comment or tested more widely. I found those concerns were at times highly subjective and may have been baseless. This was an inexplicable natural justice failing in assessing an existing senior employee going through a stressful restructuring that was prolonged and complex. Given there was no review procedure for these appointments or ability to appear before the moderation panel, Mr Janes had no opportunity to seek reconsideration and FENZ cannot be said to have genuinely considered any submission from Mr Janes.

[95] I find applying s 103A, that FENZ's approach to the non-reassignment, non-selection and then failure to redeploy Mr Janes to a Group Manger role, were not the actions of a fair and reasonable employer in all the circumstances.

[96] A more reasonable approach, in line with s 30 of the FENZ Act and Mr Janes' IEA (that required FENZ "endeavour to find you an alternative position within Fire and Emergency New Zealand, appropriate to your skills and experience") was to rely upon Mr Janes' CV and application letter and his known experience and capabilities. Additionally, the CORE assessment of his suitability and exploration of references to assure FENZ of any concerns would have been sufficient. This would have provided an adequate mix of objective and subjective measures to properly assess Mr Janes suitability. Instead, I find Mr Janes was treated as if he was an external candidate and FENZ used the interview process to determine who they considered subjectively 'best suited'.

Good faith

[97] To ensure a redundancy is enacted in a procedurally fair manner, good faith obligations also apply as set out in s 4 of the Act - these include a positive disclosure obligation enabling employee access to all relevant information supporting the reason for the redundancy and detail of how it will be implemented. Further and crucially, a fully informed employee must be afforded an opportunity to comment on any redundancy proposal prior to a decision being finalised.

[98] In the context of assessing whether an employee has been denied redeployment due to the application of a selection process, s 4 (1A)(c) of the Act is relevant as it emphasises the duty of full and open communication (as Judge Couch noted in *Jinkinson*).[13]

[99] Whilst FENZ amply consulted on the restructuring proposals and provided voluminous background information (sometimes too complex) and developed evolving protocols on appointment processes, I find that FENZ was obstructive and at times uncommunicative in sharing vital information with Mr Janes after it decided to disestablish his PRFO role not re-assign then not redeploy him, into a vacant Group Manager role.

[100] I have considered under s 103A(4) additional factors including that FENZ did not deal well with Mr Janes expressed concerns when they had an opportunity to do so.

[101] I have also carefully considered that FENZ did eventually redeploy Mr Janes into a senior advisory role and appear to value his experience and that the employment relationship is ongoing. I also appreciate the restructuring for FENZ was a complex and difficult process involving many competing pressures and interest groupings and it involved building a new organisation from strands that have previously worked autonomously.

[102] Apart from the dispute over Mr Janes' relocation, I did not detect any tension during the investigation meeting in the ongoing relationship. Witnesses displayed no animosity toward Mr Janes and appeared to respect his professional capabilities in his current role. However, this role is a demotion and by its nature and the circumstances how it arose, a significant humiliation to Mr Janes and potentially an end to his career ambition. It is also objectively poor recognition of the responsibilities he undertook in his previous PRFO role.

[103] In assessing potential mitigation, I am obliged to apply s 103A(5) of the Act that allows the Authority to disregard procedural shortcomings if they are "minor; and did not result in the employee being treated unfairly". [14]

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[13] At [40] – [41].
[14] Section 103A(5)(a) and (b) Employment Relations Act 2000.

[104] However, I find that FENZ's apparent disregard of statutory considerations (s 30 of the FENZ Act) was not minor and neither were the procedural shortcomings I have identified – they all led to Mr Janes being treated unfairly.

Specific finding on issues identified

(i) Did FENZ comply with the relevant provisions of Mr Janes' employment agreement and their own restructuring guidelines governing the process of disestablishing Mr Janes' PRFO position and subsequently redeploying him?

[105] As above, I have found FENZ effectively did not comply with its own guidelines in the following manner:

- It failed to identify a redeployment position appropriate to Mr Janes "skills and experience" as per cl 10 of his individual employment agreement.
- It failed to properly and robustly, contrast the PRFO role with the Group Manager role and only conducted a limited Position Impact Assessment and failed to disclose this to Mr Janes or seek his input which led to the decision that the positions had few similarities.
- In selecting affected employees for redeployment opportunities, FENZ failed to draw a proper distinction between "suitable" for the position identified as a preference, from "best suited" for appointment, despite indicating: "Applicants who meet the suitability requirements will always be appointed before applicants who are best suited". [15]

[106] In terms of Mr Janes individual employment agreement, provision at cl 10, FENZ had an obligation to "endeavour to find you an alternative position within Fire and Emergency New Zealand, appropriate to your skills and experience". I have assessed whether the rigorous process FENZ adopted is consistent with this contractual obligation and find that it was not.

[15] FENZ Employee Transition Protocol n 1 at page 10.

[107] I would not go as far as to interpret the latter provision as FENZ had to use every endeavour to find Mr Janes a position but on the facts, FENZ knew of a vacancy that from their own CORE assessment, Mr Janes had the skills and experience to fill. They chose to ignore this and imposed a higher appointment hurdle. This was inconsistent with FENZ's obligation under the employment agreement.

[108] In finding the above I have rejected FENZ's submission that they needed to fill vacancies with "individuals who reflected its values and its aspirational goals in relation to culture" because of negative coverage (including the Coral Shaw report) which implied Mr Janes did not possess these qualities. I saw no evidence that Mr Janes was associated with past "culture" transgressions identified. I was not convinced that on the strength of Mr Janes' answers to behavioural based interview questioning, that he impliedly was likely to exhibit poor role modelling. If FENZ genuinely held this view, then they took inadequate steps to validate it.

[109] An analogous case, where an employer failed to have regard to the relevant provisions of an employment agreement is *Gilbert v Transfield Services.* Here an employee in a redundancy dispute, was subjected to a similarly elaborate selection process. The Employment Court found this approach to have ignored what the employment agreement said – which was Mr Gilbert's "skills and attributes" had to be assessed (technical skills). This also entailed an assessment of past performance. In taking a "dim view" of the way Transfield assessed Mr Gilbert's existing skills and attributes by imposing what they saw as a more robust selection process based on abstract behavioural based questioning, Chief Judge Colgan said:

> I conclude as a matter of interpretation that the collective agreement's reference to "skills and attributes" included employees' technical skills. Again, it was not open to the company to re-interpret this document unilaterally and decide that such skills would play no, or even a lesser, part in the assessment of employees for redundancy purposes. It is not to the point that Ms Leon and other managers may have considered that their review pool criteria were more "robust" than the company's WDRs [Work Development Reviews] which measured technical skills among other attributes. It is not, as the company says, that Mr Gilbert has sought to place weight and value on his WDR because he was rated more highly there than in the

> review pool scoring process… Mr Gilbert is not to be deprived of any benefits to him of that analysis.
> [16]

Findings on stated issues

(ii) Were FENZ restructuring guidelines and how they were applied consistent with s 30 Fire and Emergency New Zealand Act 2017?

[110] I find FENZ failed to observe the obligations imposed by s 30 of the FENZ Act. This was an inexplicable failing when set against the fact that they had had to defend a challenge in the Employment Court. This had affirmed that an impacted employee does not have to be the person best suited for appointment and in some situations, FENZ could dispense with a selection process. The impact off this non-compliance was to force Mr Janes to apply for lower graded positions and FENZ subjected Mr Janes to stress and anxiety over a significant period.

[111] I find FENZ breached statutory obligations owed to Mr Janes but no penalty is sought.

(iii) Was Mr Janes treated in procedurally fair and reasonable manner when he applied for a vacant Group Manager role?

[112] I find that whilst all candidates were treated equally in that the same interview format was applied and the interview panel were neutral, there was a failure of the panel (and the moderation panel) to follow through on the negative perceptions they gained of Mr Janes at interview. This led to an unbalanced decision that was objectively unsound - in that, it did not square with Mr Janes' known capabilities, experience, and qualifications. I find Mr Janes in all of the circumstances described, was not treated in a fair and reasonable manner.

(iv) Did FENZ breach any good faith obligations?

[113] I have found that FENZ breached good faith obligations owed in not sharing relevant information with Mr Janes in a timely fashion and at times not being open and communicative with Mr Janes. I have carefully considered FENZ's submission that they did orally disclose the reasons for his non-selection shortly after the decision was made. Whilst I acknowledge

[16] *Gilbert v Transfield Services* [2013] ERNZ 135 at [103].

this, I do not consider this to be adequate and could see no reason for the delay in providing Mr Janes with documentation including interview notes.

[114] Mr Janes did not claim any penalty in respect of these breaches to preserve his ongoing employment relationship. I observe a penalty or penalties would have been likely imposed but confine my findings to a declaration of breaches.

(v) Potential remedies

[115] Given Mr Janes has claimed either that he be appointed to a Group Manager role or alternatively have his current salary grandparenting arrangement continue "until his earliest age of retirement" (a date not specified), I have resolved to direct the parties to further mediation to explore a mutually agreed solution on remedies.

[116] This decision has been made in the light of the Authority's substantive findings and the unique situation of ongoing employment and the understandable complexity that FENZ has raised in placing Mr Janes in another role. [17]

[117] I stress, I have accepted Mr Janes' and Mrs Janes' compelling evidence that Mr Janes has suffered genuine ongoing distress, humiliation, and loss of dignity over a significant period and I find some of the actions of FENZ have been causative of such. In addition, to any other remedies, Mr Janes is entitled to consideration of compensation under s 123(1)(c)(i) of the Act

[118] If the parties are unable to resolve remedies in mediation or thereafter by negotiation, then I will convene a further case management conference to ascertain if any further submissions are required and if not, I will proceed to determine remedies in the usual manner and in a timely fashion. In the interim, I make the following finding on contribution.

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[17] *Harris v The Warehouse Ltd* [2014] NZEmpC 188 being one case cited in submissions that questions the scope of s 123(a) Employment Relations Act 2000 and the ability to go beyond instating someone to a position they formerly did not occupy.

(vi) Contribution

[119] Section 124 of the Act indicates that I must consider the extent to which, if at all, Mr Janes' actions contributed to the situation that gave rise to his personal grievance and assess whether any calculated remedy should be reduced.

[120] In these circumstances I find Mr Janes has not engaged in any wrongful action and he did not act in a blameworthy or culpable manner that gave rise to his personal grievance occurring, so no reduction in any of his remedies once agreed or established is warranted.

Conclusion

[121] Whilst Mr Janes has accepted the genuineness of the restructuring and that his PRFO role was properly disestablished I have found the process used in not appointing him to his preferred option of Group Manager, constituted a series of unjustified actions and in part breaches of good faith obligations.

Outcome

[122] I have found that:

a. Bruce Janes was unjustifiably disadvantaged in his employment by the actions and omissions of Fire and Emergency New Zealand during a restructuring process that resulted in him not being redeployed into a position of his preference.

b. Fire and Emergency New Zealand breached good faith obligations owed to Bruce Janes.

c. Bruce Janes did not contribute to the circumstances that gave rise to his personal grievance.

d. The parties are directed to mediation pursuant to s 159(1)(c) Employment Relations Act 2000 to explore remedies and should this not resolve matters, the Authority will issue a further determination on

remedies after providing the parties an opportunity to make further submissions.

Costs

[123] Costs are reserved. [18]

David G Beck
Member of the Employment Relations Authority

[18] For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1